IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 41

THE NEW YORK CENTRAL RAILROAD COMPANY,
Appellant,

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BERGEN COUNTY, NEW JERSEY, ROCKLAND COUNTY, NEW YORK, the NEW JERSEY MUNICIPALITIES OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD, RIDGEFIELD PARK, TEANECK and WEEHAWKEN, the CITIZENS UNITED TRANSIT COMMITTEE, an unincorporated association, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and ROBERT J. KILPATRICK,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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STATEMENT AS TO JURISDICTION

Introductory Statement

Appellant (the Railroad) appeals from the final decree of the United States District Court for the District of New Jersey, entered on December 31, 1957, setting aside orders and a certificate of public convenience and necessity issued by the Interstate Commerce Commission (the I.C.C.). The Railroad submits

this Statement to show that the Supreme Court of the United States has jurisdiction of this direct appeal and that the questions presented are substantial.

Opinions Below

The opinion of the District Court for the District of New Jersey is not yet reported. The opinion of Division 4 of the I.C.C. is reported at 295 I.C.C. 385 but the later opinion of the entire Commission is not yet reported. Copies of the District Court's opinion and of the two I.C.C. opinions are annexed hereto as Appendices A, B and C, respectively.

Jurisdiction

This suit was brought, under 28 U. S. C. §§1336 and 2321, by the State of New Jersey as well as by its public utility regulatory commission to set aside the orders and the certificate of the I.C.C. authorizing the Railroad to abandon operation of its two ferry lines. The final decree of the District Court annulling the I.C.C. orders and certificate was dated December 30, 1957 and was entered on December 31, 1957. The Railroad's Notice of Appeal was filed in that Court on January 31, 1958. The jurisdiction of the Supreme Court to review this decree by direct appeal is conferred by 28 U. S. C. §§1253 and 2101(b). There are many decisions which sustain the jurisdiction of the Supreme Court to review the decree on direct appeal in this case. Two of them are: *Pan-Atlantic S. S. Corp.* v. *Atlantic Coast Line R. R.*, 353 U. S. 436 (1957); *Alleghany Corp.* v. *Brswick & Co.*, 353 U. S. 151 (1957).

Questions Presented

1. Whether the Railroad's proposed complete cessation of operation of each of its two ferry lines across the Hudson River between its ferry terminal at Weehawken, New Jersey, and its ferry terminals at 42nd Street and Cortlandt Street, respectively, in New York City, New York, is an abandonment of a line of railroad, or a portion thereof, within the meaning and scope of Sections 1(18-20) of the Interstate Commerce Act.

2. Whether the I.C.C. had jurisdiction under said statutory provisions to issue its certificate of public convenience and necessity dated September 27, 1956 (in its Finance Docket No. 18781) that public convenience and necessity permitted abandonment by the Railroad of these two interstate ferry lines.

3. If the I.C.C. had jurisdiction to issue said certificate, whether the evidence in the record before the I.C.C. is sufficient to sustain the certificate and the finding of public convenience and necessity contained therein.

The first two questions present what is hereinafter sometimes referred to as the jurisdictional issue. The third question presents what is hereinafter sometimes referred to as the evidentiary issue.

Statutes Involved

The statute primarily involved is Section 1(18) of the Interstate Commerce Act (49 U. S. C. §1(18)) which provides that

> "* * * no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. * * *"

Section 1(3)(a) of the Interstate Commerce Act (49 U. S. C. §1(3)(a)) defines the term "railroad" to include "bridges, car floats, lighters, and ferries used by or operated in connection with any railroad".

The relevant portion of Section 1(3)(a) of the Interstate Commerce Act and the provisions of Sections 1(18-20) of said Act are set forth in Appendix D hereto.

Statement

The Railroad operates two passenger ferry lines (one of which carries motor vehicles as well as passengers as is common in the case of passenger ferries) across the Hudson River. One of such lines runs between the Railroad's ferry terminal at Weehawken, New Jersey and its ferry terminal at 42nd Street in New York City; the other runs between its Weehawken ferry terminal and its ferry terminal at Cortlandt Street in New York City. The Railroad also

transports freight across the Hudson River by car float and lighter. As the I.C.C. Division 4 opinion found from the evidence in the record (Appendix B hereto, p. B-7):

> "The ferry terminals, docks, vessels, and other facilities and services of the New York Central are maintained physically apart from the car-float and lighter equipment and other facilities used in transporting freight across the river. * * *"

The Railroad's annual out-of-pocket losses from operation of its ferry lines have been large and have been increasing (they amounted to over $1,250,000 in 1954). Its annual out-of-pocket losses from operation of its River Division commuter trains which connect with the ferry lines at Weehawken have been even larger. Therefore, the Railroad toward the end of 1954 instituted a proceeding before the I.C.C., pursuant to Sections 1(18-20) of the Interstate Commerce Act, asking authority completely to abandon operation of these ferry lines.

In the summer of 1955, a number of hearings were held before an I.C.C. examiner on the Railroad's application. The record of those hearings consists of 1631 pages of transcript and numerous exhibits, some of which are voluminous. The opponents of the abandonment application made strenuous objections, challenging the jurisdiction of the I.C.C. and also contending that public convenience and necessity would not permit abandonment. The examiner in March 1956 submitted a proposed report in which he recommended the granting of the certificate of public convenience and necessity applied for.

The matter was then briefed and argued before Division 4 which in September 1956 (Appendix B hereto) unanimously upheld the examiner's recommendations (except that it rejected one condition which the examiner had proposed) and granted the Railroad's application. Reargument before the full Commission was applied for by opponents of the abandonment, and another round of briefs and reargument before the full Commission followed. In May 1957, the full Commission unanimously affirmed the decision of its Division 4 (Appendix C hereto).

The State of New Jersey and its regulatory commission then instituted this suit in the District Court to set aside the I.C.C. certificate of public convenience and necessity. The suit was brought against the United States and the I.C.C., and the other above-named appellees intervened as plaintiffs and the Railroad intervened as a defendant. After argument in September 1957 before the 3-Judge District Court, that Court in December 1957 rendered a decision annulling the I.C.C. certificate and permanently enjoining its effectiveness.

The District Court rested its decision on the single ground that the I.C.C. did not have jurisdiction to grant the Railroad's application. Its holding was that complete cessation of the passenger ferry operations would not constitute an abandonment under Section 1(18) but would be merely a partial discontinuance of service not covered by Section 1(18). The sole reason why the District Court held that an abandonment of lines of railroad was not involved was that freight is being carried by the Railroad across the Hudson River by car float and lighter and will continue to be so carried after cessation of operation of

the ferry lines as proposed. It was these continuing freight operations which, in the view of the District Court, transformed an abandonment of ferry lines which would otherwise clearly have been subject to Section 1(18) into a partial discontinuance of service over which the I.C.C. did not have jurisdiction. In so holding, the Court gave no weight to the fact that such freight operations across the Hudson River are entirely separate from the passenger ferry operations, since they are carried on by facilities other than the passenger ferry facilities and are between points other than the ferry terminals. Nor did the Court's decision accord even the slightest weight to the I.C.C.'s extensively considered and carefully formulated jurisdictional findings or to the I.C.C. conclusion therefrom that, under Section 1(18), it had jurisdiction over the proposed abandonment of the ferry lines.

The District Court also indicated that it would be unwilling to give effect in this case to the I.C.C. findings relating to public convenience and necessity. While grounding its decision on the jurisdictional point, the District Court went on (Appendix A hereto, p. A-11) to express "serious doubts of the adequacy of the findings of fact [relating to public convenience and necessity] and of their support by substantial evidence", thereby indicating that, if this Court reverses on the jurisdictional point and remands the case, the District Court will thereupon proceed to set aside the I.C.C.'s findings and conclusion that the abandonment should be permitted in the public interest. This intimation by the District Court is made in the face of the principle repeatedly announced by this Court that the Courts should not substitute their judgment for that of the I.C.C. as to what is required

in the public interest, provided only that there is substantial supporting evidence in the record. A reading of the I.C.C. Division 4 opinion (Appendix B hereto) setting forth pertinent evidence will we think demonstrate that there is evidence in the record sufficient to support the I.C.C. findings and conclusion on public convenience and necessity.

Nor is the foregoing the only indication of further adverse action by the District Court if the case is remanded to it. The District Court in its opinion suggested also that there was a possible separate impediment to effectuating the I.C.C. certificate, *i. e.*, that it might be "an invasion and usurpation of the jurisdiction of the states of New Jersey and New York" (Appendix A hereto, p. A-11); this notwithstanding that appellant's ferries engage in nothing but interstate commerce and that Section 1(20) of the Interstate Commerce Act explicitly provides that upon issuance of the I.C.C. certificate a railroad may proceed thereunder "without securing approval other than such certificate".*

In these circumstances, we shall, as later herein set forth, ask this Court, if this appeal is heard, not only to reverse the District Court on the jurisdictional issue but also to pass on the sufficiency of the evidence to support the I.C.C. certificate. In no other way can the Railroad obtain the relief to which it believes

* The District Court also suggested that franchise provisions might make it impossible for appellant to abandon the passenger ferry lines without abandoning all operations across the Hudson River. Not only is there no such franchise obligation, but, even if there were such, this Court has determined that I.C.C. action under Sections 1(18-20) is not affected or limited by such provisions (*Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, 391 (1932); *Colorado* v. *United States*, 271 U. S. 153, 165 (1926)).

itself to be clearly entitled, and which it urgently needs, without the extensive delay which would be entailed in the event of a reversal by this Court on the jurisdictional issue followed by an adverse decision by the District Court on the evidentiary issue and a subsequent second appeal to this Court.

The Questions Presented Are Substantial

A. The jurisdictional question.

1. **The jurisdictional issue is important.** The jurisdictional issue presented here is not only of great importance to the Railroad; it is of national importance.

The jurisdictional issue involves conflicting claims of the United States and the States of New Jersey and New York regarding exercise of Federal jurisdiction over interstate commerce, and such questions have traditionally been for this Court to determine when an important conflict arises.

Moreover, on the decision of the jurisdictional issue in this case may hang the solvency of the Railroad and of other railroads having similar passenger ferry problems.* In addition to the recent I.C.C. decisions in this case and the *Erie* case, the I.C.C. in four earlier decisions which are later herein cited (two of them upheld by 3-Judge District Courts) authorized abandonment of four passenger ferry lines operated by other railroads across the Hudson River; and, if the result reached by the District Court below is right, it

* The decision in the present case was immediately followed by the District Court's annulling, on the same ground, an I.C.C. certificate granted to the Erie Railroad permitting it to abandon its costly passenger ferry line across the Hudson River.

necessarily follows that those decisions rendered between 1941 and 1954 all reached the wrong result.* The decision below, if it stands, might therefore eventuate in efforts by the States of New Jersey and New York to compel reinstatement of those other four ferry lines (heretofore abandoned on the basis of I.C.C. action which, under the holding below, was beyond its jurisdiction) at a cost to those railroads of millions of dollars a year (see *Sprague* v. *Woll*, 122 F. 2d 128 (7th Cir. 1941), *cert. denied*, 314 U. S. 669 (1941)).

The out-of-pocket losses incurred by the Railroad itself in the operation of its two ferry lines, of the magnitude already referred to, are by themselves a cause for national concern. As the culmination of years of staggering losses from passenger operations, the Railroad and other railroads now find themselves in difficult financial straits, as is a matter of wide public knowledge. This condition has arisen, in large part, from requirements of local regulatory commissions that railroads continue to operate losing passenger services; the present case is a prime instance of such crippling pressure on the railroads.

Here we have the States of New Jersey and New York (two out of the eleven states in which the Railroad operates) arrayed against the Railroad to compel continuance of these losing interstate passenger ferry services in the face of I.C.C. findings (a) that the

* As will hereinafter be set forth, the railroads involved in those cases had freight operations across the Hudson River similar to those of the Railroad, and, furthermore, each of them had one or more ferry lines across the Hudson River which were to remain in operation following cessation of operation of the particular ferry line involved in the abandonment proceeding.

losses are caused by desertion by the public of the ferries, over a period of thirty years, for other modes of transportation across the Hudson River, (b) that reasonably adequate alternate service is available to those still using these ferries, and (c) that their operation, and the resultant draining of the Railroad's resources, should be ended in the public interest. The preservation of the solvency of the Railroad, and of other railroads in a similar position, is of vital interest to the economy of the country in peace as well as to the national defense in case of war. The decision below is one of the factors driving the Railroad toward bankruptcy.

Also, the question here involves the respective functions of regulatory commissions and the Courts and the important issue whether, when jurisdiction of a commission depends on construction of the language of the regulatory statute, the District Court may ignore a commission's reasonable jurisdictional findings and substitute its own judgment for that of the commission on technical matters.

Another aspect of the situation should be called to this Court's attention. The States of New Jersey and New York have contended, and will hereafter contend, that, if the I.C.C. does not have jurisdiction over the ferry abandonments, the States have such jurisdiction. That contention has been and will be made despite the fact that this Court has held that these interstate ferries are not subject to regulation by any State (*New York Central R. R.* v. *Hudson County*, 227 U. S. 248 (1913)). Under the doctrine of that case, the result of the District Court's holding that the I.C.C. has no jurisdiction is that the Railroad may

discontinue the ferry operations at will, but the two States refuse to recognize the controlling effect of that decision. Accordingly, if the decision below stands, the issue as to State jurisdiction will have to be determined in further litigation between the States and the Railroad. In these circumstances, if this Court does not hear and determine now the issue as to I.C.C. jurisdiction, the ferry matter will nevertheless in all likelihood come back to this Court for decision by it on the issue of State jurisdiction, with the Railroad in the meantime having suffered additional heavy losses. Lengthy further litigation and such later review by this Court may be avoided if this Court settles the jurisdictional issue now before it.

If, as we shall now show in summary fashion, there is not only a substantial question as to the soundness of the decision below but indeed that the decision is erroneous, we submit, for the reasons stated above, that the importance of the jurisdictional issue calls for its plenary consideration and determination by this Court.

2. **Not only is there a substantial question as to the soundness of the decision below on the jurisdictional issue but that decision is erroneous.** We believe that the detailed discussion of the jurisdictional issue in the I.C.C. opinions (Appendix B hereto, pp. B-7 to B-10; Appendix C hereto, pp. C-3, C-4) itself demonstrates that the conclusion reached by the District Court is incorrect.

The issue is whether Section 1(18) of the Interstate Commerce Act applies to complete cessation of operations of the Railroad's two passenger ferry lines. Sec-

tion 1(18) requires that a railroad obtain a certificate of public convenience and necessity from the I.C.C. before the railroad may "abandon all or any portion of a line of railroad, or the operation thereof". Section 1(3)(a) defines "railroad" to include railroad "ferries". Accordingly, as the Court below itself found, abandonment of a ferry line may be an abandonment of "a line of railroad" subject to Section 1(18).*

However, the District Court went on to hold that complete cessation of operation of appellant's two ferry lines would not be an "abandonment" of lines of railroad but only a "partial discontinuance of service", because thereafter appellant's freight operations over the Hudson River (using facilities and routes entirely different from those of the passenger ferry lines) were to continue. To support this holding, the District Court cited (Appendix A hereto, pp. A-5, A-6) a number of I.C.C. decisions for the proposition that, where only part of the service over a line is being discontinued, that is not an abandonment of the line over which the I.C.C. has jurisdiction under Section 1(18). It is paradoxical that the District Court relied so heavily on these I.C.C. decisions which distinguish between an abandonment of a line and a partial discontinuance of service over a line but at the same time refused to pay any attention to the I.C.C. holding in the present case, consistent with a line of prior I.C.C. decisions, that here there was involved an abandonment of lines to which its "partial discontinuance" decisions were inapplicable.

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* It will be noted that Section 1(18) embraces abandonment either of a "line" or of "any portion of a line". In the present case, it is unimportant whether appellant's ferry lines are each regarded as a "line" or as a "portion of a line".

As we understand the District Court's decision, it is that all passenger and freight transportation over the Hudson River to and from any points in New York City by any one railroad whose trains terminate at a point on the west shore opposite New York City is to be regarded as being all over one line. Under that decision, as long as a railroad is to continue any freight transportation service over the Hudson River by any means, the I.C.C. has no jurisdiction over that railroad's complete cessation of operation of a passenger ferry line or lines across the river. However, if there is a lack of I.C.C. jurisdiction as to such *abandonments* of passenger ferry lines, the same lack of I.C.C. jurisdiction must exist as to *extensions* involving the establishment of new passenger ferry lines (where marine freight operations exist). Section 1(18) requires a certificate of public convenience and necessity for extension, as well as abandonment, of a line of railroad (which, by definition, includes a ferry line). "Abandonment" and "extension" of lines must be correlative terms in the application of Sections 1(18-20). Under the decision below, it would follow that, if a railroad having carfloat or lighterage freight operations over a river wished to create an entirely new passenger ferry line over the river between new terminals to compete with a number of existing ferry lines which adequately serve the public need, it could do so without compliance with the provisions of Section 1(18). Congress could not possibly have intended such a result. It appears to us to be a *reductio ad absurdum* that, under the District Court's decision, such a new competing ferry line could be created without compliance with the provisions of Section 1(18) merely because the railroad also carries freight across the river by other facilities

and between points other than the terminals of the new ferry line.

The essential point on which the District Court fell into error was its assumption that, because the Railroad had only one rail line for passengers and freight north of Weehawken, it followed necessarily that there could be only one line between Weehawken and all points across the Hudson River. Considering rail lines as an analogy, there are, of course, innumerable cases of a railroad having a rail line into a city, with the traffic of that line being dispersed among, and continuing out of the city on, two or more of its rail lines. Certainly, if a railroad wanted to abandon one of two of its lines running, say, east from a city, it could not proceed without complying with Section 1(18) merely because the two lines east of the city fed, and were fed by, but one line west of the city.

It is equally clear that there is nothing uncommon in a single combined passenger and freight rail line dividing at a point into two separate lines, one for passengers and the other for freight. For example, the Railroad has a combined passenger and freight main line (the Hudson Division) running from Albany south on the east shore of the Hudson River which, when it reaches the Harlem River in New York City, divides into a freight line continuing south for miles along the Hudson River on the west side of New York City and a separate passenger line running southeasterly along the Harlem River for miles to Grand Central Terminal. Obviously, an abandonment of either of these lines within the city could not be regarded as a mere partial discontinuance of service outside the scope of Section 1(18) just because there is only one Hudson Division line north of the city.

The series of proceedings of which the decision in *Yonkers* v. *United States*, 320 U. S. 685 (1944), was a part eventuated in an abandonment pursuant to Section 1(18) of an electric line passenger branch of the Railroad (*Public Service Com'n of New York* v. *United States*, 56 F. Supp. 351 (S. D. N. Y. 1944), *aff'd*, 323 U. S. 675 (1944)). The electric line passenger branch was an off-shoot of the Railroad's Putnam Division and the electric line trains ran on the Putnam Division from a point in New York City north to the junction point where the branch line began. The Putnam Division itself carried other freight and passenger trains north and south of the junction point. If the District Court decision in the present case were correct, it should have been held in the *Yonkers* case that, since there was only one line south of the junction point, there could not be two lines (the Putnam Division and the electric line branch) north of the junction point and that abandonment of the electric line passenger branch leading away from the junction point was therefore merely a partial discontinuance of service. But the contrary result was reached in the *Yonkers* case and I.C.C. authorization of the abandonment was upheld.

The holding below is also inconsistent with *In Re Long Island R.R.*, 92 F. Supp. 85, 88 (E. D. N. Y. 1950), where a railroad operated two alternate rail routes which ran for a distance over a common line, then diverged and thereafter arrived at the same terminal point. One of the alternate routes carried passengers and freight and the other only passengers. The Court in that case held that complete discontinuance of the alternate route carrying passengers only was an abandonment within the jurisdiction of the

I.C.C. and not merely a partial discontinuance of service. To similar effect is *Georgia* v. *United States*, 28 F. Supp. 749, 750 (3-Judge Court, E. D. Va. 1939), which also involved abandonment of a portion of a route, with another alternate route remaining between the same points.

The District Court sought to use as an analogy the situation which would exist if there were a tunnel or bridge from Weehawken to points in New York City. However, the analogy, if properly applied, is destructive of its decision. If we assume a tunnel used only to carry freight by rail from the freight yards in Weehawken to a rail line at 72nd Street in New York City, and assume also a bridge carrying exclusively passengers by electric line from the Weehawken passenger terminal to a point in lower Manhattan, there can be no question but that complete cessation of operation of the passenger electric line would be an abandonment under Section 1(18) notwithstanding that the separate tunnel was to continue as before to carry freight.

The District Court was grasping at straws when it sought to support its conclusion by the statement that the passenger ferries are repaired by the same facilities and employees of the Railroad as are used to repair its car floats and lighters. Lack of substance for this argument can easily be demonstrated: Assume a railroad line 100 miles long running north from A to B and another line of the same railroad of equal length running west from A to C, and that the railroad applies for abandonment of the line between A and C; clearly, complete abandonment of the line between A and C could not be regarded as a mere partial discontinuance of service just because

the cars running over that line have been serviced in the same repair shop as the cars which run over the remaining line from A to B.

We have cited earlier herein the pages of detailed discussion in the annexed I.C.C. opinions persuasively supporting I.C.C. jurisdiction in this case. Here we shall quote only the concluding summary of the Division 4 opinion on this issue to show that it involved a reasonable exercise of I.C.C. judgment on matters within its expert knowledge which should have been accepted by the District Court (Appendix B hereto, pp. B-9, B-10):

> "We find untenable the argument that the passenger ferry line is inseparable from the freight-handling extensions of the applicant's lines across the river; and that each service is so broad and vague that neither the precise points of origin and destination nor the routes between them are identifiable. The argument of counsel fails to credit the showing of record that each of the ferry terminals is definitely fixed; that the routes between the ferry terminals are predetermined and generally are followed so far as safe navigational practices permit; and that ferry service is provided solely between the ferry terminals over the recognized routes. Considered with the other characteristics which distinguish applicant's passenger ferry service from its marine freight-handling service, we find that the applicant's ferry routes are individual extensions of lines of railroad. The situation herein is similar to an instance where the discontinuance of a particular service over a line of railroad would

> result in the trackage involved no longer being required for use in interstate commerce. Regardless of any other service provided by the carrier in the same area, it could not proceed to abandon the particular service over such line except upon our certifying that public convenience and necessity no longer require its continuation."

This Court has frequently held that, where a commission entrusted with the responsibility of administering a statute construes statutory language on which its jurisdiction depends, the commission's construction should be accepted, if reasonable, even in a case where it is not the only reasonable construction and the Court itself might have reached a different result. Thus, in *N. L. R. B.* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130-1 (1944), this Court said that, where the question was one of specific application of a broad statutory term, the Court's function to review the agency construction was limited. In that case, the agency's determination as to who were "employees" was upheld. A similar decision is *N. L. R. B.* v. *Coca-Cola Bottling Co.*, 350 U. S. 264, 269 (1956) where this Court upheld the agency's construction of the statutory word "officers". Likewise, in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145-6 (1939), the agency was upheld in determining what was meant by the statutory word "control". Further similar decisions could be cited. We submit that the same result should have been reached here by upholding the I.C.C. determination as to what was meant by "abandon * * * a line" in Section 1(18).

Not only did the District Court refuse to give any weight to the I.C.C. decision in this case, but it

swept aside as unworthy of consideration the long-established practice of the I.C.C. in taking jurisdiction over passenger ferry abandonments. This practice is reflected in the following four Hudson River ferry abandonment cases (preceding the two similar recent I.C.C. decisions in the present case and the *Erie* case).

> *Central R.R. of N. J. Trustees Ferry Abandonment*, 249 I.C.C. 269 (1941);
>
> *Erie R.R. Ferry Abandonment*, 252 I.C.C. 659 (1942);
>
> *Hoboken Ferry Co. Abandonment*, 267 I.C.C. 51 (1946), *aff'd sub nom. West 23rd Street Ferry Association Inc. v. The Hoboken Ferry Co.* (unreported opinion dated April 18, 1947, 3-Judge Court, S. D. N. Y. Civil Action No. 39-370);
>
> *Delaware, Lackawanna & W. R.R. Ferry Abandonment*, 290 I.C.C. 809 (1954), *aff'd sub nom. Board of Public Utilities Com'rs of N. J. v. United States*, 132 F. Supp. 379 (3-Judge Court, D. N. J. 1955).

Every one of those cases reached the wrong result if the result below was right. It will be noted that in two of such cases the I.C.C. decisions were sustained by 3-Judge District Courts, one less than three years ago in the very District in which the present case was decided. In every one of these cases there were freight-handling operations across the Hudson River similar to those which exist in the present case. Moreover, in every one of those cases it was mentioned in the I.C.C. and the District Court opinions that the railroad involved was abandoning only one of two or

more of its ferry lines across the Hudson; and in none of the cases was the existence of the remaining ferry line or lines found to make the cessation of the operation of the particular ferry line any less an abandonment of a line of railroad. On the other hand, in the present case, the Railroad would have no Hudson River ferry lines remaining after the proposed abandonment; nothing would remain but transportation of freight by lighter or car float. If cessation of operation of one of two ferry lines across the Hudson River is an abandonment of a line of railroad notwithstanding survival of the remaining line, *a fortiori* continuing separate freight operations across the river cannot turn a ferry line abandonment into a mere partial discontinuance of service.

All that the District Court had to say about any of these decisions going back to 1941 was that the jurisdiction of the I.C.C. was not challenged in the two cases where reversal of the I.C.C. decisions was unsuccessfully sought in the Courts. In saying this, the District Court took no account of the fact that, in the *Hoboken Ferry* case, the railroad involved itself raised before the I.C.C. the question as to the effect on I.C.C. jurisdiction of its having two surviving ferry lines and the I.C.C. considered the point in its opinion and said its jurisdiction was "clear" (267 I.C.C. at pp. 52-3). This appeared on the face of the record before the 3-Judge District Court in that case when it upheld the Commission's action. Certainly, if the ground of decision by the District Court below were sound, the theory it adopts would have occurred to the opponents of the passenger ferry abandonments involved in all these other cases, to the I.C.C. and to the

3-Judge District Courts.* The facts were plain and were there for all to see.

These decisions for many years must have been understood by the I.C.C., by the railroads and by Congress to be a proper application of Section 1(18). Long-standing decisions of the I.C.C. and the Courts on matters of great public interest and wide public knowledge and which Congress has made no move to overturn may not be tossed aside so casually on the basis of a newly invented theory which, if sound, would surely have entered into the earlier cases.

If not for the fact that the District Court did not pass on the sufficiency of the evidence to support the finding of public convenience and necessity, we would ask that this Court consider whether it should *summarily* reverse the decision of the District Court on the jurisdictional issue on the ground that it is clearly incorrect. However, since the Court would probably not wish to take summary action on the issue not passed on below, we respectfully ask the Court to note probable jurisdiction so that it may hear and determine both controlling issues, namely, the jurisdictional issue and also the evidentiary issue which will now be briefly discussed.

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* See *Bank of the United States* v. *Deveaux*, 9 U. S. (5 Cranch) 61 (1809), where the issue was as to the jurisdiction of the Federal Courts in a controversy between a corporation and an individual and Chief Justice Marshall stated with respect to certain earlier decisions (p. 88): "Those decisions are not cited as authority; for they were made without considering this particular point; *but they have much weight, as they show that this point neither occurred to the bar or the bench;* and that the common understanding of intelligent men is in favor of the right of incorporated aliens, or citizens of a different state from the defendant, to sue, in the national courts." [Italics ours.]

B. The question as to the sufficiency of the evidence to support the I.C.C. finding of public convenience and necessity.

Earlier herein, we referred to the intimation in the District Court's opinion that reversal on the jurisdictional issue by this Court and remand to the District Court for further action would result in an adverse decision by the District Court as to the sufficiency of the evidence to support the I.C.C. finding of public convenience and necessity; and we referred also to the irreparable damage to the Railroad which would follow from the long delay attendant upon such a decision and its subsequent review by this Court. If this were the kind of case where the weighing of the trial evidence was a function of the District Court, it might be impossible to avoid that delay. But this is not such a case; this Court has repeatedly held that the Courts should not review a commission finding as to what the public interest requires if, viewing the record as a whole, the finding is supported by substantial evidence (*Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951); *United States* v. *Pierce Auto Lines*, 327 U. S. 515 (1946); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939); *United States* v. *New River Co.*, 265 U. S. 533 (1924)).

That, under this Court's decisions, there is sufficient evidence to support the I.C.C. conclusion on public convenience and necessity stands out on the face of the lengthy I.C.C. opinion discussing the evidence it received (Exhibit B hereto). We shall not herein summarize that evidence but that can be done in short order in a subsequent brief on the merits. Accordingly, if this Court notes probable jurisdiction,

we shall in our briefs and argument ask the Court, in the interest of avoiding unnecessary and costly delay, to dispose of the whole case by deciding the evidentiary issue along with the jurisdictional issue. There is ample precedent for such action by this Court on an issue presented but not decided below (*Ecker* v. *Western Pacific R. R.*, 318 U. S. 448, 489 (1943); *Cole* v. *Ralph*, 252 U. S. 286, 290 (1920); *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 182 (1918)).

Conclusion

The questions presented by this appeal are substantial and of urgent importance to the Railroad. They are also of national importance because of the principles involved and because of the effect of the decision below on the Railroad and on the railroad industry as vital elements in the nation's economy. We respectfully ask that probable jurisdiction be noted.

Respectfully submitted,

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Attorneys for The New York Central Railroad Company, Appellant.

Dated: March 5, 1958.

APPENDIX A

Opinion

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil No. 559–57

BOARD OF PUBLIC UTILITY COMMMISSIONERS OF THE STATE OF NEW JERSEY, and the STATE OF NEW JERSEY,
Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,
Defendants,

and

NEW YORK CENTRAL RAILROAD COMPANY,
Intervenor.

Before McLAUGHLIN, Circuit Judge, and SMITH and WORTENDYKE, District Judges.

By McLAUGHLIN, Circuit Judge.

This action, under 28 U. S. C. §§ 1336, 1398, 2284, 2321-2325 and 5 U. S. C. § 1009, is brought by the New Jersey agency administering that state's regulatory powers over public utilities and by the state itself. It arises from the Order of the Interstate Commerce Commission of May 15, 1957 which on petition for reconsideration filed by these plaintiffs and others, affirmed the jurisdiction of the Commission and sustained the report, order and certificate

of its Division 4, permitting abandonment by the New York Central Railroad of its ferry service across the Hudson River between Weehawken, N. J. and New York City, N. Y. The New York Central Railroad has been allowed to intervene as a defendant. The Counties of Rockland, New York, and Bergen, New Jersey; the New Jersey municipalities of Bergenfield, Bogota, Dumont, Harrington Park, Haworth, Norwood, Ridgefield Park, Teaneck and Weehawken, the Citizens United Transit Committee, an unincorporated association of West Shore commuters; the Brotherhoods of Railroad Trainmen and of Locomotive Engineers; and Robert J. Kilpatrick are plaintiff-intervenors. The Public Service Commission of the State of New York has been permitted to appear as amicus curiae.

The New York Central Railroad or its predecessors since 1883 have furnished railroad passenger and freight service on the West Shore line (now known as the River Division) along the west bank of the Hudson River between Albany, New York and New York City, by way of Weehawken, New Jersey. The final portion of the line is a passenger and freight water service across New York Harbor from Weehawken to Manhattan. The application to the Commission for leave to abandon the passenger ferry service is part of an overall effort by the railroad to put an end to its West Shore passenger service, because of alleged serious financial losses in connection therewith though at the same time retaining its profitable freight operation on that line.

The dispositive question here is one of jurisdiction. Has the Commission the power to permit this railroad to discontinue its passenger ferry service across the Hudson River between Weehawken, New Jersey and New York City? The sole source of authority claimed by the Commission and urged by the carrier is Section 1, Paragraph 18 of the Interstate Commerce Act, inserted by 41 Stat.

477 (1920), as amended 49 U. S. C. § 1(18) (1952). That reads:

> "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, *and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.* * * *" (Emphasis supplied).

It is to the italicized portion that the Commission and railroad point. There can be no possible doubt about the validity of the applicable principle derived from that language. It is that the Commission has no right to permit only a partial discontinuance of the operations over a particular railroad line. Plainly Section 1(18) above bestows no such right. What the Commission and railroad insist upon is that the present situation involves the complete abandonment of a portion of a line of railroad and not simply a discontinuance of the passenger service of that portion of the line; therefore, that it is within the province of the statute.

That ferries are included within the definition of "railroad" is evidenced by Section 1(3) of the Act which provides that "The term 'railroad' as used in this part shall include all * * * ferries used by or operated in connection

with any railroad." The Commission has jurisdiction over the establishment of rates payable including those payable by passengers riding on railroad-operated ferries who do not, concomitant with their ferry travel, also ride on trains. *N. Y. Central R. R.* v. *Hudson County,* 227 U. S. 248 (1913). It is equally sound that the Commission possesses the right to allow complete abandonment of a railroad branch line though the latter be located wholly within a state. *Colorado* v. *United States,* 271 U. S. 153 (1926). Under that opinion if the contemplated stoppage of the Weehawken passenger ferry effects the complete abandonment of a line of railroad or portion of a line of railroad, the Commission's action was proper. If it is merely the elimination of part of the service of that line, the Commission has no justification for assuming control of the proceeding.

The problem is one of first impression as far as the courts are concerned. It is asserted that the so called Lackawanna case[1] is squarely against the jurisdictional arguments of the plaintiffs. Actually, the Commission's jurisdiction was not challenged in that litigation, was never before the court and not passed upon by that court. Some reference is made to an unpublished memorandum opinion in *West 23rd Street Ferry Association, et al.* v. *The Hoboken Ferry Company, et als.,* (S. D. N. Y. Dec. 31, 1946 C. A. 39-370). That was on motion for a stay. There is not the slightest indication from the extremely short opinion that the plaintiff had raised the question at all and the indications from the Commission hearing are to the contrary.

Following the 1920 bestowal upon the Commission of authority to allow abandonment of a line or portion of a line of railroad, that body in a series of opinions sharply distinguishing between partial discontinuance of service

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[1] *Board of Public Utility Commissioners of New Jersey* v. *United States, et als.,* 132 F. Supp. 379 (1955).

and complete abandonment of a line or of a portion thereof, held that discontinuance of passenger service where the freight operation was being maintained was not the complete abandonment of a line of railroad called for by Section 1(18) and consequently was beyond the power of the Commission to grant. In *Kansas City Southern Ry. Co. Application*, 94 I. C. C. 691, 692 (1925) there was a proposed discontinuance of regular passenger and freight service with the lines involved continuing to operate intermittent freight service. The Commission held that the application "is not an abandonment within the meaning of that term as used in paragraph 18 of Section 1 of the Act and that we are, therefore without jurisdiction under that section to authorize such partial discontinuance of service." In *Morris and Essex Railroad Co. Abandonment*, 175 I. C. C. 49, 52 (1931) the application asked for total abandonment, both freight and passenger, of a portion of a railroad line and of just the passenger service of the balance. The New Jersey Board of Public Utility Commissioners had denied a similar petition. The Commission recognized its jurisdiction over the first part of the application but, holding it had no authority over the second and that the latter was an essential constituent of the application, denied the entire request.

Within a year there was a third major Commission ruling on this same subject in *Norfolk & W. Ry. Co. Abandonment*, 187 I. C. C. 66 (1932). One branch of the petition in that case asked for "abandonment of service, with the exception of daily freight service • • •." This was dismissed "as curtailment of service is not within the purview of section 1(18) of the act." Other Commission opinions forcibly reiterating the doctrine are: *Chicago N. S. & M. Ry. Abandonment*, 290 I. C. C. 765, 766 (1955); *Express Service at Borden, Cambellsburg, and Pekin, Inc.*, 285 I. C. C. 303, 305 (1952); *Chicago, B. & Q. R. Co. Con-*

trol, 271 I. C. C. 63, 67 (1948); *New York Central R. Co. Abandonment*, 254 I. C. C. 745, 765 (1944); *Boston & M. R. Abandonment*, 249 I. C. C. 507, 508 (1941); *Old Colony R. Co. Trustees, Abandonment*, 244 I. C. C. 303, 304 (1941); *New York, N. H. & H. R. Co. Reorganization*, 239 I. C. C. 337, 381 (1940); *Gulf, T. & W. Ry. Co. Abandonment*, 233 I. C. C. 321, 331 (1939); *Maine Central R. Co. Abandonment*, 207 I. C. C. 97, 100 (1935).

The Supreme Court of the United States in *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939), upheld the view of the Commission in refusing to permit the discontinuance of passenger service because of lack of Commission jurisdiction "over curtailments of service and partial discontinuance." Again, in *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U. S. 341, 346 Note 7 (1951) where the dispute centered around the discontinuance of passenger service, the court commented "This is a proposed partial discontinuance and not an abandonment over which the Interstate Commerce Commission is given exclusive authority under 49 U. S. C. §§ 1(18-20)." The statutory court in *Gulf, etc. R. Co.* v. *Louisiana Public Service Commission*, 120 F. Supp. 250 (E. D. La. 1954), ruling specifically on the discontinuance of passenger service by virtue of Section 1(18) held, at page 251, "Where, however, the railroad is merely discontinuing a portion of its service, whether it be passenger or freight, there is no abandonment under Section 1(18-20), *State of Colorado* v. *United States*, supra."

The single franchise under which the West Shore Railroad (predecessor of the New York Central) operated across the Hudson River called for a unified passenger and freight service. The evidence is that "• • • they were an indivisible contract. They could not be separated." It is further established by the record that the New York Central intends to maintain its freight service

under the above franchise, simply discontinuing its passenger ferries.[2]

Contemporary state phases of this same controversy are most pertinent to the issue before us and should be noted. The New York Central, at the time of its application to the Interstate Commerce Commission with respect to its Weehawken Ferry, also sought permission from the New Jersey Public Utility Commission and the New York Public Service Commission to discontinue passenger traffic over its West Shore line, the branch concerned. Plaintiffs argue strongly that the railroad in those instances pursued the proper and ordinary course to be followed where simply partial abandonment of function is desired. Recognition of the state authority by a railroad line with respect to dropping one of two or more services is the usual procedure, witness the current request of the Baltimore

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[2] *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382 (1932), among other things, is suggested by the defendants as removing charter powers from any decisional weight in this action; whether that thought is accepted or not, the instant charter powers undeniably reveal that New York Central's ability to cross New York Harbor is founded on the original combination passenger and freight franchise. But the Claiborne opinion is far more significant and helpful on the primary dispute in this suit, namely, jurisdiction.

Briefly, the Claiborne ferry was for the transportation of passengers and property under its franchise. It was a wholly owned subsidiary extension of the owner railroad. The petition of the railroad to the Commission for permission to operate the ferry for transportation of passengers and property was allowed. We have no quarrel with that, merely stating that if later the railroad had requested the Commission for the right to discontinue the passenger phase of the ferry extension of its line, the circumstances would be basically identical with the case at bar. However, because the Claiborne ferry dealt with a minor traffic condition it could handle its freight on the same vessel as the passengers. Therefore, though the distinction is more apparent than real, it is easy to recognize the validity of the proposition that discontinuance of Claiborne's passenger service by itself would have been beyond the jurisdiction of the Commission for it would have been only a portion of the service of the ferry extension of the railroad which was being cancelled and that could not have been accomplished under Section 1(18).

& Ohio Railroad to the particular state boards for the right to end its passenger service between Washington and New York.

Commenting on the very proposals of the New York Central to the State Utility Commission for authority to discontinue West Shore passenger service, the Interstate Commerce Commission Examiner in his report to the Commission said, "As the discontinuance of passenger train service over trackage also used for freight service is not an abandonment of 'all or any portion of a line of railroad', jurisdiction to approve such proposals is not vested in the Commission."

The defendants admit that in discontinuing the passenger ferries, it is solely passenger and vehicular traffic which the railroad is stopping. They admit that the freight originating on the West Shore line, as do the passengers, and carried to the same Weehawken terminal will be brought to Weehawken as before and transported across New York Harbor by the same freight ferries as always. New York Central's petition to the New Jersey Utilities Board to drop West Shore passenger service coming into the Weehawken terminal is acknowledgment that its request is not under Section 1(18). Despite all this, defendants urge that the freight carriage bears no relation whatsoever to the passengers coming in on the same line and who continue their forward movement across the harbor to New York City just as does the freight.

The Commission and the railroad strive at length to show a physical differentiation between the passenger and freight facilities. The Commission opinion states:

> "The ferry terminals, docks, vessels and other facilities and services of Central are maintained physically separate from the car float and lighter equipment and other facilities used in transporting freight across the river. Neither the 42d Street, nor the Cortlandt Street ferry terminals are served by railroad tracks.

> The services and materials provided for the freight and passenger operations are entirely distinct from each other, or, the charges for each are clearly separable according to regular accounting methods of assigning costs."

The distinctions outlined are without a difference. They fail utterly to indicate any substantial disassociation of the ferry from its rail member. On the whole record they do not support the Commission's thesis that the passenger and freight services of the one railroad line have suddenly become separate and independent lines because they are water-borne across the harbor to the end of the same one original line.

The thought that the passenger and freight traffic do not have the same docks on the New York side is de minimus. That municipality controls its waterfront and its water transportation ties up as the city directs. Commuter passenger traffic rightfully is given convenient disembarkation locations. The associated freight can well be accommodated in less favored spots; these may be some distance away and are probably far more satisfactory sites for freight delivery. The repair and maintenance facilities are the same for the passenger and freight vessels. They are repaired in the one shop by the one group and with the same equipment. The personnel handling the two services belong to the same union.

Defendants argue that after the one passenger and freight line arrives at Weehawken it divides into a number of separate branches to reach New York City, its final destination. Two branches are the passenger-carrying ferries to 42nd Street and Cortlandt Street; the others are the freight-carrying barges proceeding to numerous freight terminals and piers. The argument seems artificial and contrived. It elicits a picture of a maze of branch line bridges and tunnels extending across the Hudson from Weehawken to all the points served on Manhattan. That

unreal result can hardly be said to reasonably emanate from the simple fact of one line of railroad, passenger and freight, passing through Weehawken on its way to its terminus on the other side of the harbor.

With reference to harbor bridges and tunnels, if the railroad had a bridge across the harbor or a tunnel under it or access to either and if it were desirable from an operative standpoint, all its passenger and freight trains could move across the bridge or through the tunnel to Manhattan and there could be no attempt to differentiate between the services. There certainly could be no application to the Commission to abandon the passenger element of the harbor portion of the line. That move, if made, would be to the New Jersey Utility Commission and its New York counterpart.

And if the railroad had such a bridge or tunnel over which part of its traffic moved while the rest traversed the river by boat, an attempt to discontinue either boat or tunnel traffic while retaining the other would be only partial discontinuance of service and not an abandonment of a line or a portion of a line of railroad over which the Commission would have jurisdiction.

Absent a bridge or tunnel, passengers can be and are shifted far more quickly and conveniently on separate vessels instead of being delayed while the freight is unloaded from the railcars and loaded aboard boats. It is because of this that the West Shore passengers are sent across the harbor on special ferries while the West Shore freight follows when ready. The distinction between the ferry boats used for transporting passengers and the lighters and barges used for moving freight is no more significant in determining whether this is only one line of railroad than would be the distinction between freight and passenger cars. The human and freight ferries are no more and no less than the continuance of the West Shore line to New York City. That being so, no amount of wordage, no hint that the judgment of the Com-

mission should be accepted, can bestow jurisdiction of this cause upon that tribunal for there is none. The Congress may in its wisdom decide to grant the requisite authority, though as yet there is no intimation of this from the legislative history, but until that time, the Commission, strictly a creature of its creating statute, is without the power to permit the discontinuance of this partial service.

Regarding the second section of this suit, which attacks the Commission's determination of public convenience and necessity, we have serious doubts of the adequacy of the findings of fact and of their support by substantial evidence, but because of the definitive conclusion of lack of jurisdiction we do not pass upon the point at this time.

A third problem is the specific contention that the Commission's decision is an invasion and usurpation of the jurisdiction of the states of New Jersey and New York. For the reason expressed we will not deal with that question either at this time.

Such findings of fact and conclusions of law as are necessary to our decision are expressed in this opinion.

The certificate granted by the Commission in Finance Docket No. 18781, dated May 15, 1957, is in excess of the statutory powers of the Commission and will be set aside and for nothing holden. Proposed decree to be submitted.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 18781

NEW YORK CENTRAL RAILROAD COMPANY FERRY ABANDONMENT

Decided September 27, 1956

1. Motions to dismiss the application for want of jurisdiction overruled.

2. Certificate issued permitting abandonment by the New York Central Railroad Company of its ferry lines across the Hudson River between Weehawken, N. J., and ferry terminals in New York City, N. Y. Conditions for protection of railway employees prescribed.

Gerald E. Dwyer, Thomas M. Healy, and *John F. Holden, Jr.,* for applicant.

William A. Roberts, Francis J. Ortman, and *Edward Villalon* for group of counties and municipalities in opposition.

James Rosen, Stephen G. Doig, Jr., Samuel L. Hirschberg, Leon M. Klingher, Arthur J. Prindle, Francis I. Howley, and *Milton T. Lasher* for individual counties, townships, and municipalities in opposition.

John S. Stillman, Robert S. Tipping, James P. Birch, and *Arthur E. Smith* for commuters associations and others in opposition.

Archibald Jordan and *Carl H. Sievers* for an estate in opposition.

Charles N. Gerard, Henry B. Freefield, and *Benedict W. Harrington* for New Jersey Board of Public Utilities Commissioners.

Philip Hodes for New York Public Service Commission.

James M. Davis, Jr., Richard R. Moore, Philip L. Hoag, Charles H. Sullivan, Charles J. Sheridan, Jr., H. V. McGloine, and *Thomas O. Jennings* for railway labor organizations.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MITCHELL, CLARKE, AND HUTCHINSON

BY DIVISION 4:

Exceptions to the report proposed by the examiner and replies to the exceptions were filed. The case has been argued orally.

The New York Central Railroad Company, hereinafter referred to as the applicant or the New York Central, by application filed December 15, 1954, requested permission to abandon its ferry lines operated across the Hudson River between Weehawken, Hudson County, N. J., and ferry terminals at West 42d Street, 1 mile, and at Cortlandt Street, 4.5 miles, both in the city, county, and State of New York, Borough of Manhattan. Numerous objections and individual letters of protest, and group petitions were filed, and a hearing was held. The New Jersey Board of Public Utilities Commissioners, the New York State Public Service Commission, and the city of New York were represented at the hearing. Bergen County, N. J., Rockland County, N. Y., and 13 municipalities in New Jersey and an association of communities of New York and New Jersey were represented by counsel. Various organizations of commuters and civic groups appeared in opposition. The Railway Labor Executives' Association and several organizations of crafts of railway employees also oppose the application.

By order of June 1, 1955, we denied petitions of several protestants who requested, among other things, that consideration of the application herein be deferred pending

a decision of the New Jersey Board of Public Utilities Commissioners regarding the New York Central's discontinuance of all passenger service on the West Shore line within New Jersey.

Area and service involved.—The ferries accommodate passengers and motor vehicles in the crossing of the Hudson River to and from the business district of New York City, referred to hereinafter as Manhattan. The 42d Street route operates almost directly across the river to the midtown section of Manhattan. The Cortlandt Street route operates downstream and serves the lower section of Manhattan, more than 4 miles south of the 42d Street terminal. The ferry service is used by persons hereinafter referred to as "railroad passengers" who are commuters or regular passengers of the New York Central's railroad service west of the river. The service also is used by "local passengers" of whom a few walk to and from the ferry terminal at Weehawken, and the others, divided about equally, arrive and depart by private automobile or by common-carrier bus.

The municipalities and other centers in the area served by the ferry and the railroad line connecting with it are included within the greater metropolitan area of New York City, which embraces a total population of many millions. The combined population of the counties of Hudson and Bergen in New Jersey, and of Rockland and Orange, in New York, through portions of which the New York Central's trains connecting with the ferry lines operate, is estimated as being 1,546,700 in 1954.[1] In terms of residential and industrial development, the counties involved, with the exception of Hudson County which already had been more completely developed than the other counties, have experienced steady growth during the past decade. Reliable studies of the existing trends have indicated that further substantial expansion will continue in the future.

[1] Regional Plan Association Bulletin No. 85, "Population 1954-1957."

The New York Central's line of railroad, which terminates at Weehawken and connects with the ferry lines in question was formerly the property of the West Shore Railroad Company, extending from Weehawken via Albany and Syracuse to Buffalo, N. Y. The portion between Weehawken and Albany is known as the River Division, and is so referred to herein. The easternmost (or southernmost) passenger station on the River Division is Weehawken. The freight trackage extends about 5 miles farther south through Hoboken to a point in Jersey City known as National Junction, where certain industries are served and where freight is interchanged with other railroads. There are 36 passenger stations on the River Division between Weehawken and Highland, N. Y., 73 miles distant, beyond which point there are no regular commuters to Manhattan. Some of the principal stations on the River Division, with the respective distances from Weehawken shown in parentheses,[2] and the estimated 1954 population, in order, are: (in New Jersey) Weehawken (0) 14,500, North Bergen (2) 44,500, Ridgefield Park (7) 11,800, Teaneck (10) 37,900, Dumont (13) 14,000; (in New York) [Old] Tappan (20) 1,400, Orangeburg (21) 24,000, Haverstraw (33) 14,700, Cornwall (53) 9,600, Newburgh (57) 43,000, and Kingston (89), 29,044 (1950 population). Most of the stations serve residents of the surrounding area up to several miles distant.

History of ferry and connecting railroad lines.—The West Shore Railroad Company acquired the Weehawken ferry lines in 1901, when it merged with the West Shore & Ontario Terminal Company. The latter had acquired the ferry lines as successor to certain constituent companies. The properties of the West Shore Railroad were leased to the New York Central from January 1, 1886, to June 30, 1952, when its properties and those of several other subsidiaries of the New York Central were merged

[2]Hereinafter, figures in parentheses immediately following the name of a point or station, denote its distance in miles from Weehawken.

into the parent company pursuant to Finance Docket No. 17700, *New York Central R. Co. Merger*, 282 I. C. C. 813 (not printed in full), decided June 18, 1952.

Additional details pertaining to the ferry lines and the predecessor companies of the West Shore & Ontario Terminal Company were presented on behalf of the estate of Conrad N. Jordan who, in 1882, had been granted a franchise and lease by the city of New York to operate a ferry from the foot of West 42d Street to and from Weehawken. Jordan assigned the franchise to the West Shore & Ontario Terminal Company in 1883 by an instrument which included a grant to Jordan of the right to resume ownership of the franchise in the event the assignee failed to assume specified obligations.

According to the testimony of the present trustee of Jordan's estate, the foregoing rights subsequently were acquired by the New York Central by mesne conveyances. The witness argues that the right to possess the railroad and the ferry properties is indivisible, and that the applicant holds the properties under a lease for the protective benefit of the true owner. He contends that abandonment of the ferry would divide the railroad and the ferry, and the effect would be the taking of private property without just compensation and without due process of law in violation of the 14th amendment of the Constitution. As proof of the facts mentioned, the trustee presented copies of nine documents dated between April 1880 and December 1888, including the franchise and assignment previously mentioned and several related deeds. The instruments do not appear to trace any privity between the original franchise holder and the applicant. On brief, the trustee requested that the application herein be denied and that such other relief be granted as is just and proper. In the light of the discussion regarding jurisdiction which follows this paragraph, we find that consideration of the application herein will not abridge the constitutional rights of the estate of Jordan, or be in derogation thereof.

Jurisdiction—motions to dismiss.—The jurisdiction of

this Commission to permit abandonment of the ferry lines was challenged by several protestants who moved that the application be dismissed. Motions of the same nature, not specifically mentioned, are embraced in the following discussion, or were not seriously pressed at the hearing.

In connection with the position of the estate of Jordan, there was a contention that we do not have jurisdiction for the reason that the New York Central is not the proper party applicant. However, the fact that the New York Central now performs the ferry service is undisputed. Its application under section 1 (18) of the Interstate Commerce Act for a certificate permitting abandonment of a portion of its line of railroad is within the scope of the Commission's jurisdiction. The possibility that at the time the ferry service is terminated there might come into existence a legal cause of action, or that a State-granted franchise right might terminate, is not a bar to the Commission's jurisdiction. In *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382 (391), involving an applicant's charter power to operate a ferry in the event authorization to do so should be granted, the Supreme Court stated that Congress never intended to impose upon the Interstate Commerce Commission the duty of determining matters of this nature before granting or withholding assent to the construction of an extension. Similarly, we are not required to decide such collateral issues in an abandonment proceeding arising under the same section of the act.

Attorneys for interested counties, municipalities, and organizations, including affected carrier employees, also moved to dismiss the application for want of jurisdiction. In support of the motions, they contend that section 1 (18) of the act, insofar as it is involved herein, concerns only the abandonment of "all or any portion of a line of railroad, or the operation thereof," and does not include the abandonment of "ferry or marine operations." By definitions specified in sections 1 (1) (a) and 1 (3) (a) of the act, the term "railroad" includes a ferry used by or operated

in connection with any railroad. Therefore, for the reason that the applicant sells through tickets involving movements over the River Division and other railroad lines and over the ferries herein, the abandonment of the ferry lines is subject to the prior issuance of a certificate of public convenience and necessity under section 1 (18). On that basis the jurisdiction of the Commission is certain.

Other motions to dismiss are based upon the New York Central's intent to continue to transport freight traffic across the Hudson River between Weehawken and Manhattan. The protestants contend that discontinuance of the passenger service only does not constitute an abandonment as defined in the act. To reach that conclusion, there must be established as a fact that the points from and to which freight service across the river is provided, and the routes used for that service, are the same as the points from and to, and the routes over which the passenger ferry lines operate.

The ferry terminals, docks, vessels, and other facilities and services of the New York Central are maintained physically apart from the car-float and lighter equipment and other facilities used in transporting freight across the river. Neither the 42d Street nor the Cortlandt Street ferry terminals are served by railroad tracks. The services and materials provided for the freight and passenger operations are entirely distinct from each other, or the charges for each are clearly separable according to regular accounting methods of assigning costs. Despite these showings of fact, the protestants argue that the use of boats instead of tracks as an integral part of the railroad's operation across the river, does not alter the singleness of the freight and passenger ferry operation. They conclude that if tracks, in fact, were used in crossing the river, the Commission would be without jurisdiction in this proceeding. In support, they cite various Commission and Supreme Court decisions. Factually, the situation under consideration differs from the facts in the

cases cited, in that the railroad facilities used for the handling of passengers herein are not also used for freight traffic.

Railroads operating passenger ferries as part of their lines do so in connection with specific routes to and from fixed terminal points. No flexibility is provided, and each separate set of origin and destination points is considered a route distinct from each other route. The distinctness of the route is acknowledged even if one of the terminals served has other ferry routes originating or ending at other points in the same municipality or area. The extension of any existing ferry route or the commencement of additional routes cannot be undertaken unless and until, under section 1 (18), we certify that the public convenience and necessity require or will require the extended or additional line of railroad. It follows as a corollary under the same section of the act that no ferry route may be abandoned without there first having been obtained from the Commission a certificate permitting the proposed abandonment.

This concept has been reflected in a long series of proceedings wherein abandonment has been permitted of one of a carrier's several ferry lines which serve the same area or municipality. In each case, a particular ferry line and the right to operate thereover were completely eliminated. All the service previously provided by the abandoned ferry ceased, while one or more other ferry lines in the same vicinity were continued in operation. See *Central R. Co. of New Jersey Trustees Ferry Abandonment*, 249 I. C. C. 269, decided October 2, 1941; *Erie R. Co. Ferry Abandonment*, 252 I. C. C. 659, decided June 19, 1942; *Hoboken Ferry Co. Abandonment*, 267 I. C. C. 51, decided October 10, 1946; and Finance Docket No. 18324, *Delaware, L. & W. R. Co. Ferry Abandonment*, 290 I. C. C. 809 (not printed in full), decided November 10, 1954. In all but the first of these cases, the issue of public convenience and necessity was contested. In several of the cases, in addition to passenger ferry lines, the

applicant also engaged in transporting freight across the river in question, either prior or subsequent to the movement by rail. The same situation prevails here. The decisions show that the through movement of passenger or freight traffic over routes and between terminals not involved in the operation of passenger ferry lines within the same area does not deprive the Commission of its statutory power to consider the effect upon the public of a proposal to abandon ferry lines.

At every stage of the proceeding herein, including argument before us, counsel for the protestants urged that section 1 (18) provisions do not apply to the proposed abandonment of the ferry service. They cited several decisions which established that marine services in harbors and rivers, which are incidental to a carrier's railroad service, are included in the definition of a line of railroad or extension thereof. We agree with those decisions. Counsel further contend that discontinuance of only a portion of the service over a line of railroad would not be an abandonment within the meaning of the act, because a line of railroad constitutes a service embracing freight and passenger operations. Nevertheless, in reply to a question from the bench, an attorney for the protestants conceded that our jurisdiction would lie to consider the abandonment of 1 of 2 physically separate lines between the same given points.

We find untenable the argument that the passenger ferry line is inseparable from the freight-handling extensions of the applicant's lines across the river; and that each service is so broad and vague that neither the precise points of origin and destination nor the routes between them are identifiable. The argument of counsel fails to credit the showing of record that each of the ferry terminals is definitely fixed; that the routes between the ferry terminals are predetermined and generally are followed so far as safe navigational practices permit; and that ferry service is provided solely between the ferry terminals over the recognized routes. Considered with

the other characteristics which distinguish applicant's passenger ferry service from its marine freight-handling service, we find that the applicant's ferry routes are individual extensions of lines of railroad. The situation herein is similar to an instance where the discontinuance of a particular service over a line of railroad would result in the trackage involved no longer being required for use in interstate commerce. Regardless of any other service provided by the carrier in the same area, it could not proceed to abandon the particular service over such line except upon our certifying that public convenience and necessity no longer require its continuation.

The motions to dismiss the application for want of jurisdiction will be overruled. In the report herein, we will consider the proposal to abandon the ferries on the merits presented in the record.

Ferry facilities and service.—The ferry terminal at Weehawken is part of the passenger station of the New York Central's River Division. The ferry terminals at 42d Street and Cortlandt Street are leased from the city of New York. The applicant considers the ferry terminals at Weehawken and at 42d Street to be in satisfactory condition, and the Cortlandt Street terminal to be in poor condition, in need of repairs estimated to cost $173,300. Several witnesses declared that the ferry terminals are not satisfactory, are without adequate public conveniences and are unattractive and that the terminal at Cortlandt Street is especially rundown and possibly a menace to health and safety. Among other things, the "bridge" at Cortlandt Street and the approaches to it, over which vehicles boarding and leaving the ferry vessels must pass, are in need of extensive repairs. This deficiency was cited as the reason for the New York Central having discontinued vehicle ferriage to and from Cortlandt Street late in 1954. The protestants point to the unusable bridge as one of various examples of neglect practiced by the applicant to help discourage use of the ferry facilities. Actually, the bridge referred to had broken down during

a morning rush hour, but had been repaired and placed in service again within a short period of time. The failure to continue accommodating vehicles was caused by a driveway approach to the ferry landing having become unsafe to use until repaired. The record is not clear whether the applicant is responsible for the repairs, or if a department of New York City or some other governmental body is responsible therefor. At any rate, it appears that no regulatory agency had required the applicant to reinstitute the ferriage of vehicles to and from Cortlandt Street. No appearance was entered in this proceeding against the abandonment of vehicle ferriage.

The facilities at Weehawken include five slips for berthing the ferry vessels. Service over the ferry lines is provided by seven vessels which are regularly inspected and certificated by the U. S. Coast Guard, and are maintained in good condition. The use of six vessels is required to operate the present schedules of the ferries. Of the vessels now in service, the oldest was built and placed in service in 1903, and the others during 1906, 1910, 1912, 1914, 1917, and 1925. The capacity of 6 of the vessels is from 1,251 to 1,293 passengers each, and of the newest vessel, the capacity is 1,640 passengers. Each vessel also has capacity for 20 passenger cars or the equivalent in trucks and cars. The original cost of the vessels ranged from $171,135 in 1906 to $253,335 in 1917, and $471,102 for the vessel built in 1925. If the ferry lines are abandoned, the vessels will be tied up or sold at scrap prices. The applicant estimates that the present-day cost of building vessels of the specifications of those now in use would be between $1,250,000 and $1,500,000 each.

The ferries transport passengers and vehicles. They handle no freight. Among the vehicles using the ferries are trucks of the Railway Express Agency, Inc., the United States Post Office, and trucking companies em-

ployed by the applicant for hauling railroad maintenance materials to the point of use in New Jersey, and contract-carrier transportation of railroad less-than-carload traffic to and from points on the River Division between Manhattan and Congers (29), N. Y. Since sometime in 1952, no express vehicles have been handled over the Cortlandt Street route.

Between Weehawken and 42d Street the ferries make 95 round trips each weekday and 47 and 46 round trips on Saturdays and Sundays, respectively. The weekday trips are operated on a 10-minute schedule from 6 a. m. to 8 a. m., and from 3:50 p. m. to 6:50 p. m.; on a 15-minute schedule during the remainder of the day up to 11 p. m.; and on 30-minute schedules from 11 p. m. to 6 a. m. every night. Prior to April 1953, headways of 7 minutes and 10 minutes were maintained instead of the present 10-and 15-minute headways. To and from Cortlandt Street the ferries make 12 round trips each weekday with no service on Saturdays, Sundays, or holidays. Of the daily round trips to and from Cortlandt Street, 5 are made from 7:35 a. m. to 9:45 a. m., and 7 from 3 p. m. to 6 p. m. All trips start and finish at the Weehawken terminal where the vessels are serviced and where they are stored when not in use.

Traffic handled by the ferries.—The volume of passenger and vehicular traffic over the ferry each year from and after 1921, according to statistical data drawn from records of ticket sales and turnstile collections, is summarized in the following rounded figures: Total number of passengers per year increased from 20.53 million in 1921 to 27.17 million in 1927, and vehicular traffic increased from 1.47 million to 2.19 million in the same years. Commencing in 1928, the annual passenger totals declined steadily, except for a slight rise in 1937 over the 1936 volume. Passengers handled by the ferry lines in 1921 (the earliest year shown), 1927 (the highest volume year), and 1954 (the latest full year), in that order, were 12.72

million, 17.69 million and 1.49 million local; and 7.80 million, 9.48 million, and 2.08 million railroad. In 1954 the local passenger traffic amounted to 8.45 percent of the volume of that traffic in 1927, and the railroad passenger traffic amounted to 21.9 percent of the 1927 traffic of that category. The total number of vehicles transported by the ferries declined over the 1928–54 period, and in the latter year less than 0.5 million vehicles were ferried. As shown, the vehicular traffic in 1954 was about 19.63 percent of that traffic in 1927.

The foregoing passenger totals do not include allowances for non-revenue riders represented by company employees using passes or reduced-fare privileges, and other persons riding deadhead on the ferries. In that connection, counsel for protestants referred to a disclosure made by a witness for the New York Central during a proceeding pending before the New Jersey commission, which showed that about 40,000 free-ride privileges had been accorded on River Division trains during November 1954. The applicant's practices in regard to pass riders are not shown to be in violation of any applicable laws, rules, and regulations. Nor has it been shown that the non-revenue riders caused any appreciable loss of paying riders, or otherwise reflected to the detriment of the ferry operations.

Financial results of operating the ferries.—The operations of the applicant's ferry lines were profitable between 1922 and 1933. A peak profit of approximately $500,000 was produced in 1926. However, the operations since the early 1930's have resulted in annual losses which increased practically every year. The net loss to the applicant resulting from the operation of the ferry lines during 1952, 1953, 1954, and the first four months of 1955 amounted to $1,166,564, $1,184,906, $1,266,998, and $398,701, respectively. The specific items of revenue and expenses for the 3 full years mentioned are tabulated for easy reference in appendix A, attached hereto.

The data underlying the principal items of revenue and expense were submitted, and employees and officials of the applicant testified regarding the component figures and the totals.

The revenues recorded as accruing to the ferry lines from fares paid by "railroad passengers" are based on ticket sales at all stations on the River Division and at the ferry terminals. Of the railroad through tickets sold; i. e., basic fare one-way and round-trip tickets, and multiple-ride 12- and 26-trip tickets, revenues are credited to the ferry at the regular fares of 10 cents to and from 42d Street and 20 cents to and from Cortlandt Street. Revenues derived from restricted and unrestricted monthly commutation tickets to and from each station on the railroad are allocated upon bases approved by the Commission in *Weehawken Ferry Fares and Charges*, 277 I. C. C. 95, decided March 6, 1950, which established the use of a mileage prorate, plus flat sums of $1.50 on 42d Street tickets and $4 on Cortlandt Street tickets. The revenues from fares of the local passengers are credited entirely to the ferry lines, as are all revenues received from the ferriage of vehicles.

Other revenues credited to the ferry lines include a portion of the net express revenues earned by the New York Central's lines which comprise the "New York Central proper." This portion is allocated to the constituent lines and to the ferries on a mileage basis in proportion to the ferry mileage (5.5 miles during 1952 and 1.0 mile after 1952) divided by the affected passenger road mileage of the New York Central. Of the total express revenues of more than $9.3 million in 1952, $9.8 million in 1953, and $8.2 million in 1954, the ferries were credited with $16,206, $3,244, and $2,797, respectively, to which is added a flat sum of $1,000 per year, representing payment received from the New York, Ontario and Western Railway Company (Ferdinand J. Sieghardt, trustee) for express vehicle movements over the ferries in conjunc-

tion with the latter's trackage rights (includes no passenger trains) over the River Division between Cornwall (53) and Weehawken.

Repairs to each of the ferry vessels are provided according to recommendations by inspectors of the Coast Guard and by the New York Central's own inspectors. The labor and material charges accruing for the repair work performed in the New York Central's yard during 1952, 1953, and 1954, in that order, totaled $197,181, $284,180, and $304,019; and the work performed at outside concerns totaled $173,215, $67,021, and $115,863, respectively. The charges accrued at the New York Central's yard do not include any overhead or supervisory costs, and those paid to the outside yards are as invoiced after completion of the work. In 1954, repairs to ferry vessels accounted for about 25.5 percent of the work performed by the applicant's marine shop. In addition, costs relating to the maintenance of station buildings, wharves, and docks; expenses for station supplies, and cleaning and operating the ferry stations; rents paid for the terminals in New York City; real-estate taxes on land and buildings at Weehawken used solely in providing ferry service; wages; and fuel and payroll taxes which are charged to the ferry operation; all reflect actual expenditures.

River Division operations and results.—The New York Central's evidence relating to the cost of providing scheduled train service on the River Division (with no consideration accorded to revenues, expenses, or results of the ferry operation) and the revenues derived from that service was subject to full questioning by the protestants who contended that the revenues credited to the railroad, in some instances, should be decreased and the differences credited to the ferry lines, and that some of the expenses charged to the ferries should be decreased and added to the expenses of the River Division. No specific amounts of differences regarding particular items were suggested. Relating to the railroad operations, the protestants re-

quested that the New York Central be required to produce the financial results of conducting freight operations over the River Division and the connecting barge and lighterage service across the Hudson River. The examiner denied the requests as raising matters not material to a determination of the public's need for continued passenger service over the ferry lines. In view of the scope of application herein, the ruling of the examiner is sustained.

The regular passenger-train service over the River Division (exclusive of 9 schedules restricted to once a weekend only) consists of 22 trains in each direction between Weehawken and points on the line. Not all trains go to or beyond Newburgh, and not every train stops at all stations. Each schedule originates or terminates at 42d Street or Cortlandt Street via the ferries beyond Weehawken. On the basis of River Division ticket-sales records for each regular business day during November 1954, the average number of passengers per train in each direction and the origin or destination stations of the passengers are summarized in the following tabulation (limited to trains showing the highest average number of passengers):

Leave Weehawken			Arrive Weehawken		
	Destination	Passengers		Origin	Passengers
4:39 p. m..	West Haverstraw (34)	125.9	7:30 a. m..	West Haverstraw ...	32
5:16 p. m..	.... do	370.6	7:46 a. m..	Dumont	16
5:32 p. m..	Dumont (13)	349.5	7:48 a. m..	West Haverstraw ...	32
5:43 p. m..	Newburgh (57)	411.5	7:56 a. m..	West Englewood (11)	29
5:46 p. m..	West Haverstraw	386.6	8:05 a. m..	Dumont	39
5:49 p. m..	Dumont	276.0	8:07 a. m..	Newburgh	50
5:52 p. m..	.... do	208.2	8:11 a. m..	Dumont	28
5:56 p. m..	.... do	178.8	8:21 a. m..	.... do	21
6:09 p. m..	West Haverstraw	352.2	8:24 a. m..	West Haverstraw ...	52
6:34 p. m..	.... do	227.7	8:26 a. m..	Newburgh	39
7:00 p. m..	.... do	140.8	9:00 a. m..	Beyond Newburgh ..	11

Hudson River crossings and passenger traffic.—Several vehicular tunnels and a highway bridge also cross the Hudson River at Manhattan. In the lower Manhattan

area is the Holland Tunnel which opened November 13, 1927. It crosses from a point approximately 3.5 miles south of Weehawken to Canal Street, about 8 city blocks north of Cortlandt Street. In the midtown area is the Lincoln Tunnel, consisting of 2 tubes with 2 lanes each, and under construction, scheduled to be completed during 1957, is a third tube which will increase the tunnel's capacity by 50 per cent. The tunnel crosses from Weehawken, south of the ferry terminal, to about 39th Street, a few blocks south of the 42d Street ferry terminal. In the uptown portion of Manhattan is the George Washington Bridge which opened October 25, 1931. It crosses from near Fort Lee, N. J., about 10 miles by highway north of the Weehawken ferry terminal, to about 170th Street, about 7 miles north of the 42d Street ferry terminal. The area from and to which the passengers of the River Division commute or regularly travel to Manhattan is served by a complex system of primary and tributary highways which connect with the port authority bridge and tunnels.

In discussions regarding other transportation service available to River Division train riders, the record refers to a bridge opened in October 1955, as part of the New York State Thruway (New York City-Albany-Buffalo) which crosses from Nyack to Tarrytown, N. Y., some 25 miles north of Weehawken; another bridge at Bear Mountain, about 42 miles north of Weehawken; and a vehicle and passenger ferry between Newburgh and Beacon, N. Y., about 57 miles north of Weehawken. It is practicable for some individuals who travel to and from points near those facilities to cross the Hudson River north of Manhattan and reach the city by utilizing bus service on the east side of the river, or by using the New York Central's main-line trains directly to its terminal in midtown. In other instances, depending upon the availability of public transportation and the location of access highways for private automobile travel, some New York Central rail-

road-ferry patrons might be able to arrange to use other existing means of crossing the river to midtown or downtown Manhattan.

In addition to the Weehawken ferries, 3 ferry lines operated by other railroads cross the river in the area; namely, (1) the Central Railroad Company of New Jersey ferry at Jersey City, approximately 5 miles south of the Weehawken ferry terminal, crossing to Liberty Street, a short distance south of Cortlandt Street; (2) The Delaware, Lackawanna and Western Railroad Company ferry at Hoboken, approximately 3 miles south of Weehawken, crossing to Barclay Street, a few blocks north of Cortlandt Street; and (3) the Erie Railroad Company ferry at Jersey City, immediately south of Hoboken, crossing to Chambers Street, a short distance north of Barclay Street. There also are railroad and local transit lines which cross the river by tunnel or tubes. The Hudson & Manhattan Railroad Company operates electric trains from stations in Newark (about 9 miles southwest of Weehawken), Harrison (immediately east of Newark), Jersey City, and Hoboken through separate tunnels to its Hudson terminal, a short distance from Cortlandt Street, and to a station at 33d Street, adjacent to the Pennsylvania Railroad Station, about 9 city blocks south and 5 blocks east of the New York Central's 42d Street ferry terminal. Passengers of other railroads transfer to Hudson & Manhattan trains at each of the latter's stations in New Jersey. The Pennsylvania Railroad Company operates local train service, including commuter service from and to Harrison and Jersey City, in connection with the facilities and services of the Hudson & Manhattan. Through passenger trains and local trains to and from Newark and points farther from New York, are operated over the Pennsylvania's main line through Newark and across the river through its own railroad tunnel directly to the Pennsylvania Station. To the extent that the Erie and the Lackawanna terminals can be reached by persons residing in the area served by the River

Division, the Hudson & Manhattan trains are able to provide an alternative service. Likewise, residents of the area south of Weehawken who presently use the New York Central's ferry can use the tubes of the Hudson & Manhattan or the commuter service of the Pennsylvania.

Tabulated statistics prepared by a department of the Port of New York Authority, showing the annual trans-Hudson passenger traffic into and out of New York City, for each year from 1930 to 1954, inclusive, were presented by the applicant. The exhibit shows that the railroad passengers using ferries to cross the Hudson River declined almost constantly from 55.20 million (rounded figures) in 1930, to 19.73 million in 1954; those transported by railroad tunnel declined from 114.99 million to 54.37 million in the same years; railroad passengers by bus increased from 0.48 million to 1.21 million; and the total railroad passengers into and out of New York declined from 170.66 million to 75.31 million. Local passengers, or nonrailroad passengers, on the ferries decreased steadily from 38.61 million in 1930 to 2.76 million in 1954. Contrariwise, the bus passengers (excluding railroad bus passengers) increased practically every year from 8.74 million in 1930 to 67.48 million in 1954, and in the same years the number of passengers in private automobiles increased from 43.75 million to 135.32 million. In the period under discussion, the total number of passengers into and out of New York City remained relatively constant, fluctuating from 261.76 million in 1930 to 280.89 million in 1954, with a low of 213.54 in 1933 and a high of 281.60 in 1946.

The protestants object to the acceptance of the exhibit as unreliable because it was prepared partly by persons not subject to examination. They also contend that the data are immaterial as having no direct relationship to the issues pertaining to the abandonment of the ferry lines. However, we find that the data are reliable for the purpose of indicating whether the long-term pattern of trans-Hudson passenger ferry and railroad traffic is simi-

lar to the pattern of the operations experienced by the New York Central. The port authority statement corroborates the testimony presented by the applicant.

Routes alternative to the rail-ferry routes.—Passenger routes of other railroads and for-hire bus companies exist directly parallel and close to, or within short distances of, portions of the River Division rail-ferry routes. These lines, singly or with connecting lines, are available for transporting passengers between points on the River Division line and Manhattan. Among the portions of railroad lines serving the same area is a route of the Northern Railroad of New Jersey, a branch of the Erie Railroad, between the Susquehanna Transfer Station, about 0.99 mile south of the station at North Bergen (2) and its Nyack Station where the line terminates, about 1.98 miles east of West Nyack (25); a route of The New Jersey and New York Railroad Company (Horace Banta, trustee) between its Hackensack Station, about 1.16 miles west of Bogota (8) and its Nanuet Station where the line diverges westward, about 2.67 miles west of West Nyack; and a route of the New York, Susquehanna and Western Railroad Company between North Bergen and Bogota, where that line diverges westward. Each of the lines mentioned has access to the Erie terminal in Jersey City, from where the Erie ferry operates to Chambers Street, near Cortlandt Street, and the Hudson & Manhattan has a terminal. The New York, Susquehanna & Western and the Erie line to Nyack operate through Susquehanna Transfer, where transfer may be made to buses operating through the Lincoln Tunnel to midtown Manhattan.

The approximate straight-line distances between stations on the River Division and the northern branch of the Erie Railroad, to the extent that the foregoing discussion depicts them as alternative routes, range from less than 1 mile to a fraction less than 2 miles. On the New York, Susquehanna & Western the distances range from none at the Little Ferry Station which both carriers use, to less that 1 mile from Bogota, and 1.86 miles to Teaneck

(10); and the distance to the New Jersey & New York stations range from about 1 mile (near Bogota) to 4.30 miles at the greatest distance (near Blauvelt, 3 miles south of West Nyack).

The protestants contend that the service available over the suggested alternative railroad routes (except the New York Central's main line east of the river) is not adequate to serve the passengers of the River Division. They also point out that the area extending from south of Blauvelt (22) to West Nyack is characterized by a precipitous ridge and generally mountainous terrain parallel to the river. On cross-examination, the applicant's witness conceded that the Erie Railroad branch would be used only by River Division passengers who reside on or near the Erie line. Similarly, he admitted that the line of the New Jersey & New York would not be used by many present River Division patrons. However, to the extent that some of those persons presently drive their own automobiles to the station they now use, those individuals undoubtedly would be able to drive to a station of one of the other railroads with relatively little increase in mileage and time of travel.

Over objection, the examiner permitted evidence relating to bus routes to show to what extent the service they afford is alternative to that of the New York Central's rail-ferry service. Because of the relationship of all media of transportation available to the public, and the effect of each upon the other, the ruling of the examiner is sustained.

Numerous bus routes are wholly or partly competitive with the rail-ferry routes, and the bus companies are competitive with each other and with the railroads. The buses serving midtown Manhattan are routed via the Lincoln Tunnel over a direct special ramp, and arrive at and depart from the New York Port Authority Bus Terminal, located between 40th and 41st Streets a few blocks south and east of the 42d St .et ferry terminal. Other buses

use independently owned terminals within the same area. There are various types of public surface and subway transportation facilities available at the bus terminals to and from every section of Manhattan. No local passenger buses operate through the Holland Tunnel or otherwise serve the area in the vicinity of Cortlandt Street.

According to representatives of the present users of River Division-Weehawken ferry routes, the available bus service is inadequate to provide the transportation which is required. They allege that the bus companies do not have sufficient equipment to handle additional passengers during the morning and evening rush hours; do not operate schedules suitable to persons employed in Manhattan; do not provide sufficient all-night service; permit overcrowding beyond comfort; are subject to delays due to crowded highways and the rush-hour capacity of the tunnels and bridges; are more prone than trains to traffic accidents and to weather conditions; are less able to provide personal attention to the aged and handicapped travelers; and in movements beyond 25 miles, require longer elapsed time and somewhat higher fares. Officials of towns close to Weehawken testified that the streets and road accesses to the Lincoln Tunnel, including those in the vicinity of Weehawken, are unable to handle more buses, and that those presently operating to and from points beyond do not have seating or standing space to serve the area near Weehawken. The available alternative modes of traveling to George Washington Bridge and to the railroad and ferry terminals at Hoboken and Jersey City involve circuitous routes, longer travel time, and extra costs. Regarding the foregoing observations, we concur in the belief expressed by the applicant that the operators of the bus companies, as a matter of competitive self-interest, will augment their facilities, improve their schedules, and provide the necessary added service when the proposed abandonment of the ferries creates more passengers and adds to the present public

need for better bus service; and that the New Jersey and the New York utility commissions will require adequate facilities and equipment. In any event, the present schedules, routes, and specific trips of the buses are not criteria for judging the bus operators' response to new demands for service. The applicant's witness recited that an official of a major New Jersey-Manhattan bus company which serves the area between Weehawken and West Norwood (18), stated that the company is able to handle extra passengers without acquiring new equipment, and is interested in serving more passengers. The protestants did not contradict this, or object to admission of the statement in evidence. On the other hand, 1 of 2 bus companies which operate between Manhattan and areas near River Division stations between Orangeburg (21) and Newburgh (57) and beyond, is said to arrange its schedules with the specific intent of discouraging the commutation business.

Traffic problems affecting Manhattan.—Traffic congestion in the New York City area gave rise to the creation of the Port of New York Authority by the Legislatures of New York and New Jersey in 1921, as a self-supporting agency, to acquire and/or operate any terminal or transportation facility in the port district, and to make charges for their use. It presently operates 17 water, air, and motor-vehicle facilities, including the tunnels, bridge, and bus terminal previously mentioned. To alleviate the present congestion (in addition to the construction of the third tube of the Lincoln Tunnel), the port authority has recommended and is ready to proceed with the construction of a six-lane lower deck on the George Washington Bridge, expected to be in use in 1960. The port authority's annual report for 1955, presented in evidence by the protestants, suggests that a program be undertaken to improve rail passenger facilities between New Jersey and Manhattan but adds that improvement thereof probably would attract few trans-Hudson auto-

mobile passengers and would do little to alleviate the traffic situation.

The Metropolitan Rapid Transit Commission is also concerned with congestion within the New York City area. It is a temporary body created as a bi-State agency on June 14, 1954, as successor to the separate State commissions which previously had issued a joint report dated March 3, 1954. The commission's purpose is to conduct studies and make recommendations as to the "present and prospective rapid transit needs of the area." The joint report, which has been followed by an interim report dated February 18, 1955, found that there had been a sharp increase in the use of automobiles and buses for commuting, and a decline in the use of railroads, and that the trend was most pronounced in the New Jersey sector of the metropolitan area where "railroad commuting has declined 30 percent since 1930, while auto and bus use increased fourfold." Citing the growth of automobile registrations between 1930 and 1952, the report stated that in the area in question billions of dollars have been expended by Federal, State, and municipal governments in providing for vehicular traffic facilities, while no public funds were spent in improving the railroad traffic flow between Manhattan and New Jersey. The chairman of the commission, under subpena, estimated that at least 18 months would be required to issue an overall report, and that any recommended projects probably would be extremely costly, and would be subject to appropriate legislation by the States.

An assistant to the commissioner of traffic of New York City estimated that if the present rush-hour ferry passengers would change to using buses, about sixty-one 40-passenger busses (not including standees) would be needed to accommodate the 42d Street riders, and about 42 such buses would be needed for the Cortlandt Street riders. If all the 8,000 daily ferry riders were to convert to using private automobiles, the daily rush-hour traffic would be

increased by between 1,400 and 1,600 automobiles. Blockages and backing up of traffic occur during the peak hours in both directions at each of the port authority tunnels and the bridge. In the opinion of port authority officials, the theoretical capacity of the Lincoln Tunnel has not been reached. However, construction of the third tube of the tunnel was recommended in anticipation that the present capacity soon would be exceeded. On the basis of tentative estimates by department heads, the port authority has concluded that the additional buses required to transport the present ferry passengers could be handled at the bus terminal without difficulty.

General position of the protestants.—The governing bodies of the counties and several municipalities of the area served by the River Division presented resolutions of protest. A petition of protest was received in evidence, which was said to contain 5,334 signatures obtained by circulation among the riders of commuter rush-hour trains during morning trips of 1 day. Many of the affected persons anticipate probable depreciation of the value of suburban homes which were acquired in reliance upon the convenience of the River Division service to and from Manhattan. Some persons stated that they would be required to surrender their homes and move to places where better transportation service is available, or to leave their present jobs and seek employment at places more convenient to the transportation remaining after the ferry is abandoned.

A frequent contention of the protesting witnesses is that the use of alternative bus or combination bus-railroad service involves inordinate delays in their travel to and from Manhattan. Persons traveling between 5 points in Rockland County and Manhattan via the ferries require 75 minutes to complete their trip. By direct through alternative bus service they would require from 70 to 100 minutes for the same trip (based upon estimated auto traveltime and published schedules, if any). If and when

such service becomes available, use of a bus across the new Tarrytown Bridge to connect with the New York Central's main-line trains east of the Hudson River would require between 70 and 85 minutes. In but one instance would both alternative services require more time than the present service. As to a point requiring 65 minutes' traveltime, and another requiring 80 minutes over the rail-ferry route, direct bus service would entail 85 and 105 minutes, respectively, and the bus (via bridge) rail service would require 80 minutes. The record shows that in some instances the alternative services require the same or a lesser amount of traveltime, and in other instances the time elapsed in traveling between home and work is greater.

An organization composed of various protesting groups of residents throughout the affected area presented a summary of the result of a survey conducted on Wednesday, May 4, 1955. About 4,000 questionnaires had been distributed on the morning trains to Manhattan, and collected the following day or were returned by mail within a few days. Usable responses were received from 2,608 persons. The returns indicate that the number of passengers who regularly use 4 River Division stations between 10 and 13 miles from Weehawken ranges from 276 to 355; that those using 6 other stations between 7 and 25 miles from Weehawken range from 118 to 201; that passengers using 8 other stations between 18 and 35 miles from Weehawken range from 20 to 85; and that 15 persons use 1 of 4 stations within 10 miles, or beyond 35 miles from Weehawken. The business addresses or the destinations within Manhattan, if any, were collated according to selected zones, and, of those who replied, 1,395 persons travel to the lower downtown area, to which the Cortlandt Street ferry terminal is convenient, and 1,118 persons travel to the midtown area which is more convenient to the 42d Street terminal.

Regarding the use of alternative transportation if the

ferries are not available, 279 persons indicated that they would use automobiles, 1,299 would use buses, 209 would use other railroads, and 733 would use combinations of the other facilities; 1,732 stated they would have to travel more miles, 384 would travel the same distance, and 94 would travel fewer miles; 1,814 stated that their trips would require more time, 336 the same time, and 136 would use less time per trip; 1,514 would experience higher costs, 164 would have the same costs, and 511 would have less costs. In addition, 414 persons would require a second family automobile if the ferry is abandoned, 994 regard bus travel less desirable than train travel, 582 state that they would be required to walk greater distances; 729 believe the alternative schedules of service would be awkward for them, and 138 state that their health would not permit their using any of the alternative services.

Witnesses for the protestants expressed personal opinions that, by its neglect or otherwise, the New York Central has contributed to the decline of passengers and revenues on the River Division and on the ferry lines. Among the allegations pertaining to the ferry are cited the failure to improve the ferry terminals; the obsolete character of the vessels in service, and the high cost of their maintenance and operation; the absence of effective advertising and public relations; and the failure to offer reasonable inducements to prospective passengers. The New York Central also is criticized for not increasing the ferry fares and charges; and for disrupting railroad service for the United States mail and the express agency over the River Division and the ferries.

The applicant's witnesses state that the New York Central has continued the ferry service for many years despite constant losses, and that the existing and prospective highway and bridge improvements in the area are expected to perpetuate the losses. They point out that the ferry terminals are maintained adequately for the traffic handled, and that any improvements thereto would

increase the tax assessments of the terminal properties and add to the cost of operations; that maintenance and operation of the present vessels are more economical than would be the cost of capitalizing new equipment plus the cost of maintenance and operation; that the River Division ferry service is advertised as well as other passenger services are advertised; that, as authorized, the various classes of fares have been increased twice since 1945; and that neither the Post Office Department nor the Railway Express Agency has expressed concern over the prospective discontinuance of service. Studies cited indicate that an increase of about 300 percent in revenues would be necessary to balance the operating costs, or that operating expenses would have to be reduced by a factor of approximately two-thirds; and that even if major capital expenditures are made to induce more patronage on the River Division, the New York Central could achieve an increase of not more than 25 per cent within a period of 3 or 4 years.

Specific contentions of the protestants.—Aside from the allegations that we lack jurisdiction, the most basic contention on behalf of the protestants involves the proposition that the ferry connections to and from Manhattan are so essential to the River Division railroad service that the proposed abandonment, if permitted, would make the railroad completely useless to persons residing in the territory it serves. The uselessness allegedly would be caused by the proposed removal of direct service between Weehawken and Manhattan. For that reason, counsel submits that we should handle the application herein as if it contained a single proposal to abandon the applicant's railroad passenger service to Albany, 142 miles. Supporting that argument, the counsel distinguishes the situation herein from the facts involved in our previous decisions permitting the abandonment of railroad ferry facilities across the Hudson River. The point of variance is said to be that in the earlier cases other ferry services

of the applicant or some other carrier remained available to provide for the needs of the public. The cases referred to are those cited in the discussion hereinabove pertaining to our jurisdiction.

The foregoing argument would have binding validity only if there were no possible form of public transportation other than ferry service that could be used to cross the river. In the era before buses and bridge and tunnel crossings were commonly used, the facts herein might warrant the findings urged by protestants. Even under today's conditions, if a large proportion of the users of the applicant's railroad could not conveniently adjust their transportation habits to avoid the necessity of using the terminal at Weehawken, the protestants' logic would be sound. But, under the present conditions of competitive transportation, we cannot determine this case on either of the suggested bases.

The fallacy of the argument is that the protestants fail to recognize that reasonably adequate and convenient substitute service is available for those who now travel to Manhattan via Weehawken. As previously reviewed herein, the users of the applicant's rail-ferry service have one or more of several choices as to substitute transportation. Conceivably, they might use bus service between their home areas and uptown or midtown New York; they might use other railroad lines to and from points reasonably close to much of the territory served by the River Division; they might use River Division trains to other stations in the vicinity of Weehawken at which connecting bus service is available; or they might develop a method of travel combining any of these ways with private-automobile rides over some portion of their trips. The most convincing proof that the available substitute service is satisfactory and reasonably comparable to applicant's railroad service in terms of cost, convenience of schedules, elapsed time of travel, and general safety and comfort is the undenied fact that in a period of 27

years more than 16 million passengers voluntarily ceased to make use of the applicant's ferry service. This fact is particularly important in view of the growth of the communities and the great increase in population within the affected New Jersey and New York counties.

Also advanced by the protestants is the contention that the ferries of the applicant are vital factors of national defense and should be available for emergency use in the event the evacuation of the population of New York City becomes necessary. The director of civil defense for New York State, in a statement as a witness under subpena, urges that the applicant's ferries would be important in moving people by railroad to New Jersey and other inland areas, especially in the event electric-power facilities are disrupted and the tunnels and other transportation services are not operable. Civil defense also would rely upon the use of private automobiles and the existing railroad freight facilities in emergency removal plans. There is an abundant supply of marine equipment in and near the Hudson River which is operated by the New York Central and other railroad carriers for the handling of freight, and there are passenger-carrying vessels of other transportation agencies, all of which could be commandeered for emergency use. We believe that civil defense preparation is a governmental function which the railroads should not be required to subsidize by sustaining monetary losses.

The protestants include a general contention that the application should be denied because any losses incurred in passenger service have been compensated for by recent general increases in freight rates. It is argued that Congress intended to have the rail carriers' freight operations support any deficits that might be involved in the operation of passenger service. In support of this position, there is cited the decision of the Supreme Court in *King* v. *United States*, 344 U. S. 254 (reviewing the Commission's decision of August 2, 1949, in Ex Parte

No. 168, *Increased Freight Rates, 1948*, 272 I. C. C. 695, 276 I. C. C. 9), which reflects a change of the prior policy of requiring each class of service to provide its proportionate share of expenses and profits. In that proceeding, the Commission's giving weight to passenger deficits when prescribing intrastate freight rates was found proper.

In proof that the principle of the cited decision is applicable herein, the protestants refer to the New York Central's net income during the first 6 months of 1955 being $26,513,491, and for the year of 1954 being $9,187,509. In view of the increased income, the protestants conclude that the applicant's sustaining a loss on the operation of the ferries and the River Division passenger service will not adversely affect the performance of the New York Central's functions as a common carrier. Other statistical data of record regarding the operations of the applicant's company show that, with the exception of the war years (1942-46), passenger net operating deficits were incurred each year 1936 through 1954. Those deficits ranged from $8,390,292 in 1936 to $54,266,425 in 1951, and during the same years freight net operating income each year ranged from $8,505,063 in 1945 to $114,656,180 in 1953. The applicant shows that the percentage of freight net operating income required to absorb the passenger deficits ranged from 16 percent to 42.2 percent in the years before the war, and from 47.8 percent to 61 percent since the war.

The *King* case, *supra*, and decisions cited therein concern the Commission's power to order increases of freight rates, and establish that the existence of passenger operating deficits is an element to be considered in such matters. In no manner did the Court pass upon the propriety of permitting the abandonment of passenger operations which result in consistent net operating deficits. To apply the contentions advanced by the protestants would be tantamount to vitiating the purpose of the abandonment provisions of the act. In the *King* case, page 262,

the Court recognized that because of the growth of vigorous competition from automobiles and other forms of transportation, the railroads have been forced to abandon passenger mileage, reduce service, and improve their facilities, while fixing passenger fares at a level as adequate as competition permitted. Moreover, in the case which the Supreme Court then was considering (276 I. C. C. 9, 32-40) and in numerous other decisions before and since the *King* case, the Commission has admonished carriers to attempt, so far as possible, to make each class of service pay its own way, and urged the abandonment of unprofitable train services as a means of ameliorating the huge passenger-service deficits.

The other contentions mentioned hereinbefore present issues which have been discussed and considered in previous proceedings involving ferry abandonments, and in each instance were found not of controlling importance. Those matters would not be controlling unless supported by evidence that the public interest demands continuation of operations which impose a burden upon the carrier and upon interstate commerce. The effect of the proposed abandonment on real-estate values in the affected area, the absence of attempts to increase fares, the methods of allocating revenues and expenses to the ferries, the capacity of the overall profits of the applicant's other services to absorb the line's losses, the inducement of greater patronage by advertising, and the degree of inconvenience visited upon individuals are discussed in the report of the division dated November 10, 1954, in Finance Docket No. 18324, *Delaware, L. & W. R. Co. Ferry Abandonment, supra.* See also *Hoboken Ferry Co. Abandonment, supra.* On the record in this proceeding, we find that these contentions of the protestants are untenable.

Related passenger-train discontinuance proceedings.— After filing the application in this proceeding, the New York Central applied separately to the New Jersey Board

of Public Utilities Commissioners and the New York Public Service Commission for authority to discontinue all scheduled passenger trains on the River Division within those States between Weehawken and Albany. The New York proceeding was recently reached for public hearing. The New Jersey commission held extensive hearings, and by a decision dated November 3, 1955, denied the New York Central's request for the reason that 4,000 daily commutation passengers constitute a reasonable public demand, sufficient to require continuation of the rail-ferry service, or rail service with some satisfactory substitute for the ferry operation. A copy of that decision, pursuant to the petition of the protestants, was received in evidence on December 20, 1955.

In reaching its decision, the New Jersey commission, among other things, stated that in considering the demand for service and the contribution which the profit-producing trains make toward the reduction of overhead expenses, a satisfactory solution would be provided if approximately 8 round trips were operated Mondays through Fridays during commuter hours and 1 round trip were operated daily, if required, for the transportation of mail and express between Weehawken or Jersey City and Albany. In the opinion, the New Jersey commission intimated that, because its jurisdiction extends over the applicant's operations up to the State line in the middle of the Hudson River, and because there is no station precisely on the State line, the ferry service is subject to the State's jurisdiction up to the station immediately beyond the State line. Nevertheless, the State commission does not question our jurisdiction over the ferry abandonment, and the dictum referred to in no manner changes our conclusions as to the proper jurisdiction.

At oral argument, the parties informed us that subsequent to its November decision the New Jersey commission approved a request by the New York Central to reduce the River Division train service from 23 daily

trains to 11 trains in each direction Mondays through Fridays, and to discontinue all other scheduled passenger service. Implementation of any new schedules by the New York Central depends upon whether the decision of the New York State commission, when isued, would permit the New York Central to discontinue within New York operation of those trains which would be eliminated under the New Jersey authorization. At the oral argument, counsel for the applicant volunteered the information that 1 plan being studied by the Metropolitan Rapid Transit Commission is to arrange for adequate bus service for the convenience of the present River Division train passengers to and from Little Ferry, a point on the applicant's line about 6 miles north of Weehawken. If that is done, the affected passenger trains in New Jersey would terminate at Little Ferry, and scheduled traintime would be reduced by approximately 12 minutes, and buses would transport the passengers between Little Ferry and the Port Authority Bus Terminal via the Lincoln Tunnel. According to the applicant's counsel, this would provide a practicable and feasible substitute form of public transportation for the crossing of the Hudson River.

Consideration of conditional authorization.—Apropos of arranging for substitute public facilities to cross the Hudson River in the event the applicant's ferry service is discontinued, the examiner recommended that the abandonment be permitted subject to a condition precedent which would require the New York Central to construct station or trackage-connecting facilities to make it possible for River Division passengers to transfer conveniently to and from the existing trains, ferries, and bus services of other carriers. Specifically, the examiner suggested that the New York Central extend its present passenger service in New Jersey about 5 miles southward beyond Weehawken to or near National Junction, by routing the passenger trains over existing tracks of the New York Central which are presently used solely for the interchange

of freight with the Pennsylvania Railroad. At least during 1908, the tracks in question had been used for the movement of scheduled passenger trains to and from the Pennsylvania's terminal in Jersey City, known as the Exchange Place Terminal.

The applicant and the protestants both excepted to the requirement that substitute services be made available, each alleging primarily that the facts of record do not justify a conclusion that the arrangement would be physically possible or reasonable in terms of cost to the applicant, or that the passengers would utilize the route which would be circuitous and involve 2- or 3-carrier connecting service. The applicant contends that the abandonment should be granted without any restricting conditions, and the protestants contend that the authority should be denied in its entirety, granting no relief not requested by the applicant. The protestants also charge that the imposition of the suggested condition would be beyond our jurisdiction. In view of our conclusions herein, a discussion of the question of our powers to impose conditions is not necessary.

At oral argument, counsel for the New Jersey Board of Public Utilities Commissioners supported the imposition of a condition on the theory that necessary facilities could be constructed to permit the transfer of the River Division passengers to the Hudson & Manhattan tube trains at National Junction. Counsel for the Brotherhood of Railroad Trainmen suggested a condition whereby the New York Central would be required to connect with the Pennsylvania's freight tracks at National Junction and use the latter's trackage from that point to the Exchange Place Terminal where the Hudson & Manhattan service also is available. Neither counsel presented plans to show the physical changes that would be required, nor did they present estimates of the cost or other elements that would be entailed. Responding to the suggestions, counsel for the applicant indicated that grade

differences of its trackage and the lines of railroads which operate to ferry terminals at Jersey City and Hoboken would prohibit any physical connections being constructed; that to construct passenger platforms among the freight tracks near the points where the New York Central's tracks are nearest the other carriers' respective tracks, and to provide stairways or elevators to reach the street level, would be hazardous, and also would be impracticable because the other carriers' terminals would be at least 1 mile away from the point of ascension; and that to transfer passengers at the Exchange Place Terminal would involve engineering difficulties pertaining to passenger trains using freight tracks, probably would not be acceptable to the Pennsylvania Railroad, and would not be practicable for the passengers because about 30 minutes' added traveltime would be required. The applicant concludes that none of the suggested substitute services would be adequate or acceptable.

It is our opinion that the small portion of the public which presently uses the applicant's ferry service, and the consequent substantial operating losses suffered by the applicant, place no special responsibility upon the applicant to arrange substitute service for crossing the Hudson River. We find no basis in the record for imposing the suggested conditions.

Effect upon railway employees.—The vessels used in conducting the ferry operations are manned by 9 crews, each consisting of a ferry captain, wheelsman, engineer, fireman, oiler, janitor, and 2 deckhands. A full crew is used every trip, except that janitors work daytimes only. In addition to the ferry crews, operation of the ferry lines requires the full time of 23 employees at the terminal in Weehawken, 26 at 42d Street, and 10 at Cortlandt Street.

There are about 120 operating employees and 132 non-operating train service employees engaged in the passenger-train service over the River Division. Any of those employees affected by the abandonment of the

ferry or by the discontinuance of train service pursuant to State authorization may exercise seniority rights and return to freight service. If the ferries are abandoned and senior employees exercise their rights, persons who were recently hired may be furloughed. For the protection of the interests of any employee adversely affected, the New York Central has agreed to the imposition of conditions the same as those prescribed in our decision in *Chicago, B. & Q. R. Co. Abandonment*, 257 I. C. C. 700. Conditions similar to those mentioned will be imposed for the protection of all employees affected by the abandonment authorized herein.

Conclusions and findings.—The record in this proceeding also warrants these further conclusions and findings: The Weehawken ferries and the River Division passenger service of the New York Central together provide transportation between areas west of the Hudson River in New Jersey and New York having a population in excess of 1.5 million and the Manhattan section of New York City. About 4,000 residents of the area use the ferries in each direction every week-day, mostly during the hours of traveling to and from their places of employment. In 1954, the applicant's ferries carried about one-sixth of the total which they carried in 1927. During the period between 1930 and 1954, the number of passenger crossings by all public ferries, tunnels, and bridges to and from Manhattan (up to about 25 miles north thereof) fluctuated between 213 and 281 million. In that period, the number of passengers using public buses which crossed the river increased from less than 9 million to about 67.5 million, and passengers using private automobiles increased from about 43.5 million to more than 135 million.

Financially, the operation of the ferries produced deficits of between $1.16 million and $1.26 million during 1952-54, and substantial additional deficits were incurred from the operation of the River Division passenger trains. The deficits have been continuous since the 1930's, and there is

no indication that the condition will improve in the future. The deficits incurred by any type of carrier service offered the public must be overcome by income derived from other services, if the carriers involved are to continue serving the public. In that sense, the operating deficits of a particular service are paid by the public in the form of higher costs for other transportation services. To the extent that any portion of the service which produces the deficit can be and is eliminated or reduced, interstate commerce would be relieved of the burden imposed by those deficits. On those premises, we conclude that transportation generally should not be burdened with the cost of providing facilities which can be discontinued without too greatly disturbing the convenience of the public. We find that the railroad-ferry service has become outmoded and unnecessary as a direct consequence of a preponderant portion of the public who once relied upon the applicant's service having adapted their riding habits to the use of alternative modes of transportation. We recognize that in this case, as in most proceedings involving the abandonment of railroad facilities to some extent still relied upon by passengers or shippers, some individuals face personal hardship in arranging alternative public transportation. However, the circumstances will not permit our overlooking the greater overall injury that would result if the ferry were required to be continued.

Contentions and requested findings not discussed herein and not reflected in our conclusions have been given consideration and found without material significance or not justified. We find, subject to the imposition of the conditions mentioned to protect carrier employees, that the present and future public convenience and necessity permit abandonment by The New York Central Railroad Company of its ferry lines between Weehawken, N. J., and the ferry terminals in New York City, N. Y., described hereinabove.

An appropriate certificate will be issued, effective from and after 40 days from its date, in which suitable provision will be made for the cancellation of tariffs, the submission of journal entries, and compliance with valuation order No. 24.

APPENDIX A [to I. C. C. Report]

Net railway operating income, Weehawken ferry lines

	Year 1952	Year 1953	Year 1954
Revenues			
Railroad passengers	$191,504	$184,653	$182,193
Local passengers	195,206	203,213	191,200
Express	18,539	4,244	3,797
Vehicles	168,522	169,941	169,211
Rent from ferryboat charters	.....	1,200	1,415
Station and boat privileges	19,127	16,830	15,510
Rent of buildings	4,635	4,635	4,635
Total revenues	597,533	584,716	567,961
Expenses			
Maintenance station building	6,141	9,930	7,423
Maintenance wharves and docks	16,881	52,734	71,517
Insurance	10,408	10,408	10,408
Maintenance joint station	3,717	8,080	.....
Repairs to ferryboats	370,396	351,201	419,882
Ferryboat depreciation	39,635	37,276	37,276
Injuries to persons	29	37	38
Advertising	9,705	2,514	1,848
Station employees	285,153	281,522	269,521
Station supplies and expenses:			
Supplies and expense	12,651	17,464	16,916
Rent 42d St. Terminal	53,100	53,100	53,100
Rent Cortlandt St. Terminal	42,740	39,261	42,850
Operating joint yards and terminal	150	88	.....
Operating floating equipment	802,952	787,439	772,793
Stationery and printing	3,809	3,677	2,300
Other expenses	1,398	1,883	3,492
Insurance	2,095	1,920	1,920
Damage to property	271	15	400
Loss and damage—baggage	47	120	94
Injuries to persons	3,013	1,868	14,613
Payroll taxes	57,709	62,985	63,217
Real-estate taxes	42,097	46,100	45,291
Total expenses	1,764,097	1,769,622	1,834,959
Net loss	1,166,564	1,184,908	1,266,998

CERTIFICATE AND ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 27th day of September A. D. 1956.

Finance Docket No. 18781

NEW YORK CENTRAL RAILROAD COMPANY FERRY ABANDONMENT

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That, subject to the conditions for the protection of employees referred to in said report, the present and future public convenience and necessity permit abandonment by The New York Central Railroad Company of its ferry lines across the Hudson River between Weehawken, N. J., and ferry terminals in New York City, N. Y., described in the report aforesaid.

It is ordered, That this certificate shall take effect and be in force from and after 40 days from its date. Tariffs applicable to the ferry herein permitted to be abandoned may be canceled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That The New York Central Railroad Company, when filing schedules cancelling tariffs applicable to the ferry lines in question, shall in such schedules refer to this certificate by title, date, and docket number.

It is further ordered, That if the authority herein granted is exercised, The New York Central Railroad Company shall submit for our consideration and approval two copies of the journal entries showing the retirement of the ferry lines from service.

It is further ordered, That The New York Central Railroad Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

And it is further ordered, That the motions to dismiss the application for want of jurisdiction, filed by counties, municipalities, groups of individuals, and other organizations, be, and they are hereby, overruled.

By the Commission, division 4.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 18781

NEW YORK CENTRAL RAILROAD COMPANY FERRY ABANDONMENT

Decided May 15, 1957

Upon reconsideration:

1. Prior report, 295 I. C. C. 385, overruling motions to dismiss for want of jurisdiction, and issuing certificate and order permitting abandonment by the New York Central Railroad Company of its ferry lines across the Hudson River between Weehawken, N. J., and ferry terminals in New York City, N. Y., affirmed. Effective date of certificate and order prescribed.

2. Petitions of the protestants, except so far as they seek reconsideration, denied.

Appearances as shown in previous report, and *William G. Mahoney* for Railway Labor Executives' Association.

REPORT OF THE COMMISSION ON RECONSIDERATION

By the Commission:

By report, certificate, and order in this proceeding, dated September 27, 1956, 295 I. C. C. 385, division 4 overruled motions to dismiss the application for want of jurisdiction, and, subject to appropriate conditions for the protection of adversely affected carrier employees,

permitted abandonment by The New York Central Railroad Company, of its ferry lines across the Hudson River between Weehawken, N. J., and ferry terminals in New York City, N. Y. Individual petitions for further hearing, reargument before and reconsideration by the entire Commission, and other relief were filed on behalf of the Estate of Conrad N. Jordan, the Brotherhood of Railroad Trainmen and a commuter, interested agencies of the State of New Jersey, and the Railway Labor Executives' Association, and jointly on behalf of Bergen County, N. J., Rockland County, N. Y., and 13 municipalities in New Jersey. The applicant replied to the petitions.

Under section 17(8) of the Interstate Commerce Act, the filing of the petitions stayed the effective date of the certificate and order pending disposition thereof. By order of January 28, 1957, the proceeding was reopened for reconsideration and assigned for reargument before us, and action on the requests to vacate the certificate and order, and for further hearing was deferred. Oral argument was heard.

Upon consideration of the record in this proceeding, the contentions set forth in the petitions against the division's report, and the arguments presented in support of the parties' respective positions, we conclude that no showing has been made to warrant reversal or modification of the report, certificate, and order of division 4. In our discussion we will repeat only those facts and arguments contained in the prior report which are necessary for the sake of clarity. Other contentions and arguments in support thereof have been found not pertinent to the issues reconsidered, or not justified on their merits.

The issue of primary importance is whether the Congress has conferred upon us jurisdiction to permit the abandonment of railroad transportation service across a waterway by means of ferry vessels equipped to handle passengers and highway motor vehicles. Section 1(18)

of the Interstate Commerce Act provides in part, that no carrier by railroad subject to part I of the act shall abandon all or any portion of the line of railroad, or operation thereof, unless there shall first have been obtained from us a certificate that public convenience and necessity permit such abandonment. The term "railroad" as used in part I includes "ferries used by or operated in connection with any railroad." Since the record is clear that the facilities of the ferry herein are utilized in the transportation of passengers on through rail tickets, the fact that the *res* involved in this proceeding is a ferry line rather than a segment of railroad trackage does not affect our jurisdiction. Compare *New York, P. & N. R. Co. Ferry Abandonment*, 290 I. C. C. 249 (266), *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382, and *Colorado v. United States*, 271 U. S. 153.

Our jurisdiction also is questioned on the theory that because the applicant proposes to discontinue only its passenger ferry service between Weehawken and New York City, while it intends to continue to transport freight, mail, and express between the same cities by other means and over different routes there will be no "abandonment of a line of railroad" within the meaning of section 1(18). However, in reply to a question at oral argument, counsel for the protestants conceded that the jurisdiction of this Commission would be beyond doubt if the applicant proposed to abandon a line of railroad over which all carrier service would be terminated. The record supports the conclusion that the equivalent of this situation exists here and that abandonment of the ferry and discontinuance of all service thereover, cannot lawfully be effectuated unless our jurisdiction is invoked by an application properly filed, and until we exercise our statutory powers in that regard. We find no error in the decision of the division in the matter of jurisdiction. Congress having acted to impose controls on the abandonment of lines of railroad, including ferries operat-

ing in connection therewith, the arguments of several of the protestants regarding the effect of the proposed abandonment upon the jurisdiction of the State agencies which regulate transportation within New Jersey and New York need not be discussed.

There was discussion by the protestants at argument concerning the practicability of requiring the applicant to provide some substitute transportation service to accommodate the approximately 4,000 daily rail-ferry rides and the 3,000 daily pedestrian-ferry rides. In giving consideration to that possibility, the division concluded that because persons using Central's ferries represent only a small portion of the public that crosses the river daily between New Jersey and New York City, there is no obligation upon the applicant to arrange substitute service for their convenience.

The record discloses that the long-time average number of New Jersey-New York City commuter riders is about 250 million annually, or about 1 million each work-day, of whom fewer than 1 out of 125 commuters use the ferry service of the applicant. Other estimates are that less than 1 of each 1,000 persons who travel to their employment and business in New York City from the communities west of the Hudson River use the applicant's ferry service. But for a few individual instances of unusual hardship, it is reasonable to believe that the riders of the applicant's ferries should be able to arrange to use the existing river-crossing transportation facilities which the majority of the daily commuters find convenient and necessary. We concur in the division's finding that the few users of the applicant's ferry service places no special responsibility on the applicant to provide substitute service for crossing the Hudson River. Furthermore, as to the prospects for future additional riders, the record indicates that the need for ferry service probably will diminish as completion of current improvements to the Lincoln Tunnel and the George Washington Bridge afford

less congested highway travel between New Jersey areas and New York City.

The protestants also argue that the division erred in refusing to consider the revenues, expenses, and financial results of the applicant's handling of freight by barge and lighter across the river to and from New York City, and over the railroad line which serves the Weehawken terminal, and in not recognizing that to permit abandonment of the ferries would so decrease the number of passengers using the applicant's connecting railroad in New Jersey, that the action would be tantamount to permitting discontinuance of the passenger service on that line. It is our opinion that the losses incurred by the applicant because it operates ferry service across the Hudson River are burdensome to the applicant and the public generally, whether or not any net profits are produced by other carrier operations in the same vicinity. Likewise, our decision would not be controlled by any traffic changes that might occur on the connecting railroad line if any part of the service now provided thereover would be continued.

Several requests were made at argument on behalf of commuters and the municipalities, to delay the consummation of the abandonment in the event we deny the requests to vacate the division's certificate. It was argued that a reasonable period would be required by the individual riders to adjust their schedules of traveling to and from work, and to explore the available substitute facilities to determine which best suits their transportation needs. The argument also indicated that another report of the Metropolitan Rapid Transit Commission is expected in April, and that it might present recommendations, which if adopted, might provide a means of filling the void after the ferry service terminates. We feel that the period since the division's report already has been ample to allow a reasonable opportunity to adjust personal riding habits. However, in view of the alleged im-

pact that the necessary change in service might have upon the municipalities whose residents would be required to seek and adopt new methods of daily travel, and to allow any governmental or quasi-governmental body a reasonable period to supply an alternative means of crossing the Hudson River, if any plan should be contemplated, we will defer the effective date of the certificate herein for a period of 90 days.

On full reconsideration of the record herein, and the contentions and arguments of the protestants, we sustain the findings of fact and conclusions set forth in the division's report, and affirm the decision therein. An appropriate order will be issued denying the petitions for further hearing and other relief, and providing that the certificate and order of September 27, 1956, shall become effective from and after 90 days from the date of this report and order.

Commissioner Tuggle, being necessarily absent, did not participate in the disposition of this proceeding.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 15th day of May, A. D. 1957.

Finance Docket No. 18781

NEW YORK CENTRAL RAILROAD COMPANY FERRY ABANDONMENT

It appearing, That the Commission, division 4, issued its report and certificate and order in the above-entitled proceeding dated September 27, 1956, permitting abandon-

ment by The New York Central Railroad Company of its ferry lines across the Hudson River between Weehawken, N. J., and ferry terminals in New York City, N. Y.; that certain parties to the proceeding properly filed petitions for reconsideration, reargument, and for further hearing and reconsideration; and that this Commission having heard oral argument, and on the date hereof, having made and filed a report on reconsideration containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the said petitions for further hearing and for other relief filed by the protestants herein be, and they are hereby, denied;

It is further ordered, That the certificate and order issued herein under date of September 27, 1956, be, and it is hereby, made effective from and after 90 days from the date of this order.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX D

Relevant portions of the Interstate Commerce Act, as amended (49 U. S. C.):

§1(3)(a) (in part) "DEFINITIONS. * * * The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

§1(18) "EXTENSION OR ABANDONMENT OF LINES; CERTIFICATE REQUIRED; CONTRACTS FOR JOINT USE OF SPURS, SWITCHES, ETC. No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction ~~and~~ operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience

and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

§1(19) "APPLICATION FOR CERTIFICATE OF COMMISSION; NOTICE AND HEARING. The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates."

§1(20) "ISSUANCE OF CERTIFICATE BY COMMISSION; UNLAWFUL EXTENSION OR ABANDONMENT OF LINES. The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and

after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more that $5,000 or by imprisonment for not more than three years, or both."

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FILED
APR 18 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 41

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BERGEN COUNTY, NEW JERSEY, ROCKLAND COUNTY, NEW YORK, the NEW JERSEY MUNICIPALITIES OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD, RIDGEFIELD PARK, TEANECK and WEEHAWKEN, the CITIZENS UNITED TRANSIT COMMITTEE, an unincorporated association, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and ROBERT J. KILPATRICK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF ON BEHALF OF THE NEW YORK CENTRAL RAILROAD COMPANY, APPELLANT, IN OPPOSITION TO MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 838

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BERGEN COUNTY, NEW JERSEY, ROCKLAND COUNTY, NEW YORK, the NEW JERSEY MUNICIPALITIES OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD, RIDGEFIELD PARK, TEANECK and WEEHAWKEN, the CITIZENS UNITED TRANSIT COMMITTEE, an unincorporated association, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and ROBERT J. KILPATRICK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF ON BEHALF OF THE NEW YORK CENTRAL RAILROAD COMPANY, APPELLANT, IN OPPOSITION TO MOTION TO AFFIRM

Appellees' arguments in support of their motion to affirm (received by us on April 4, 1958) are diffuse and, in large part, do not face up to the jurisdictional issue raised on this appeal. Except as supplemented

below, we stand on our jurisdictional statement heretofore filed.

1. **Appellees' reliance on the "partial discontinuance" cases is misplaced because those decisions are not inconsistent with appellant's contentions.** Not a single authority is cited by the appellees which supports the holding of the Court below that complete cessation of operation of each of appellant's two passenger ferry lines would not be an abandonment of a line of railroad, or a portion thereof, within the scope of Section 1(18) of the Interstate Commerce Act.

The authorities cited or referred to by appellees in this connection are all holdings that, under Section 1(18), the Interstate Commerce Commission will not take jurisdiction of a mere partial discontinuance of the service over a line. In their reliance on these "partial discontinuance" cases, the appellees simply beg the question (as did the District Court). The appellees (pp. 3-6) seem to assume that the Railroad is contending that the Commission would have jurisdiction over a partial discontinuance of service; then they proceed to answer such a contention although the Railroad has not made it. This process of fashioning a straw man for the pleasure of destroying him may be satisfying to its authors but it does not deal with the question at bar.

We neither make here, nor made below, any contention that the Commission would have jurisdiction in this proceeding if the Railroad's application were found to involve only a partial discontinuance of service over a line. On the contrary, what we urge is that complete cessation of operation of appellant's pas-

senger ferry lines is not a mere partial discontinuance of service but is an abandonment within Section 1(18), as the Interstate Commerce Commission found.* Thus, there is no substance to appellees' claim (p. 18) that these "partial discontinuance" decisions are inconsistent with appellant's contentions in this case.

2. **Appellees' criticisms of the Commission's trans-Hudson ferry abandonment decisions are without merit.** The appellees (pp. 6-9) criticize the series of Interstate Commerce Commission trans-Hudson ferry abandonment decisions dating back to 1941, stating that they do not reflect a "well-considered" or "long-established" administrative interpretation and that in the first two such decisions the Commission "exercised jurisdiction somewhat absent-mindedly".

These criticisms represent mere wishful thinking on the part of the appellees. Certainly, the exercise of jurisdiction by the Commission in a series of cases running back to 1941 is "long-established".** Nor are

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* While the Commission might well have held in the first of its "partial discontinuance" decisions (*Public Convenience Application of K.C.S. Ry.*, 94 I.C.C. 691 (1925)) that Section 1(18) did give it jurisdiction over a partial abandonment of operations, it nevertheless decided to the contrary and has since followed that decision in a number of other cases. This Court, while it has not decided the issue, has cited these Commission decisions in a manner which indicated its approval of them. The Railroad has not challenged this line of Commission decisions but contends that this appeal involves an abandonment to which these decisions have no application.

** In addition to this series of trans-Hudson ferry cases, the Commission, in a number of cases since 1922, has exercised jurisdiction under Section 1(18) over ferry line abandonments in various other parts of the country. The first such case appears to be *Abandonment of Ferry by C. & O. Ry.*, 71 I.C.C. 450 (1922), where the Commission authorized abandonment of a railroad's ferry line which carried passengers and vehicles only, with "freight traffic being handled through other connections." In later pre-1941 cases,

the appellees entitled to refer to these trans-Hudson ferry decisions as not "well-considered" or as "absent-minded".

In the first two such cases, no one questioned the Commission's jurisdiction. When it came to the third such decision, in 1946 (*Hoboken Ferry Company et al. Abandonment*, 267 I.C.C. 51), the appellees' own brief (pp. 7-8) shows that the applicant railroad itself had questioned the Commission's jurisdiction. The Commission in its opinion in that case (pp. 52-3) discussed the issue and specifically included in the discussion the two earlier cases. Therefore, as early as 1946, the question of jurisdiction involved in the first three of these cases was "well-considered" by the Commission, unless the appellees are using that term merely to mean that they do not agree with the result; and the Commission again gave the issue detailed and careful consideration in the present proceeding.

In the light of the 1946 Commission opinion, it is also difficult to understand the appellees' further statement (p. 6) that the jurisdiction of the Commission was not "challenged" in these trans-Hudson ferry cases, unless their point is only that the jurisdictional question was raised in 1946 by the applicant railroad rather than its opponents. If that is their point, it is obviously without significance. No matter who

the Commission has similarly authorized abandonments of ferry lines which carried passengers and vehicles, but no freight (*e. g., Abandonment of Ferry by New York, N. H. & H. R. R.*, 159 I.C.C. 413 (1929)). Jurisdictional objections were considered and rejected by the Commission in some of these earlier ferry abandonment cases (*e. g., Delaware River Ferry Co. of New Jersey Abandonment*, 212 I.C.C. 580 (1936)). The series of trans-Hudson ferry cases cited in our jurisdictional statement (p. 20) are so squarely in point here that it seems to us unnecessary for present purposes to do more than mention these earlier ferry abandonment cases.

raised it, the jurisdictional question was raised before the Commission at least by 1946 and the Commission expressly held that its jurisdiction was "clear" (267 I.C.C., at p. 53).

3. **Appellees' franchise contention is irrelevant on this appeal.** Appellees' reliance (p. 10) on the District Court's statement that there was a "single franchise * * * for a unified passenger and freight service" is likewise misplaced.

Where an abandonment under Section 1(18) of the Interstate Commerce Act is involved, a state franchise obviously cannot limit the Federal commerce power to regulate such abandonment (*Colorado* v. *United States*, 271 U. S. 153, 165 (1926)).

4. **The statutory definition of "railroads" to include "ferries" is not meaningless, as appellees contend; it is clear, and is controlling in this case.** The appellees seem to say (pp. 10-11) that the statutory definition of "railroad" to include "ferries" has no significance here.

Their argument is that a "ferry" is merely a "boat" and is therefore not a line, or a portion of a line, of railroad. However, when one substitutes in Section 1(18) the word "ferry" for the word "railroad" the reference is to a "line of ferry" (or, more simply, a ferry line); and if one includes "ferry" with "railroad" in Section 1(18), the reference is to a line of railroad, including a ferry line.* While the appellees argue (p. 8) that the Commission's jurisdiction was

* In *Delaware River Ferry Co. of New Jersey Abandonment*, 212 I.C.C. 580 (1936), a similar jurisdictional objection which sought to nullify the effect of the Section 1(3)(a) definition of "railroads" to include "ferries" was rejected by the Commission.

not challenged in *Board of Public Utility Com'rs of N. J.* v. *United States*, 132 F. Supp. 379 (3-Judge Court, D. N. J. 1955), there can be no question but that the Court in that case held squarely that Section 1(18) does cover a ferry line. The Court after quoting the Section 1(3)(a) definition, proceeded to rule that the Commission had jurisdiction, saying (p. 381):

> "Since Hoboken is a ferry owned by the Railroad carrier and operated in conjunction with it for continuous carriage, it was necessary and proper for application to be made to the Commission under 49 U. S. C. A. § 1(18) for a certificate authorizing abandonment of ferry operations."

Also in point is *New York Central R.R.* v. *Hudson County*, 227 U. S. 248 (1913). In that opinion, this Court quoted the equivalent definition in the Interstate Commerce Act as it then read, namely, "the term railroad as used in this act shall include all bridges and ferries used or operated in connection with any railroad * * *" and went on to hold (pp. 263-4) that the effect of this definition was not merely to bring *ferry boats* as such under the Act but was to place regulation *of the interstate commerce carried on by the ferry boats* exclusively within the Federal domain.

5. **Appellees' synthetic quotation.** Appellees unsuccessfully seek (pp. 16-17) to analogize the "line of railroad" issue here involved to a case which related to whether a dressed chicken was a "manufactured" commodity.

In this connection, we wish only to emphasize that the quotation at the bottom of page 16 and at the top of page 17 of appellees' brief is the appellees' version

of what they think the District Court below *might* have said about the chicken case if the case had been discussed in the Court's opinion, but that it is *not* a quotation of anything the District Court did say. We think that the appellees do not intend to create any different impression by their purported quotation, but we believe they have not made it clear enough that the language they quote is their own.

6. **Failure of the District Court to give any weight to the Commission's administrative interpretation was clear error.** The appellees argue (pp. 15-18) that only limited weight should be given to the Commission's interpretation of the language of Section 1(18) as applied to the facts of record.

However, even this discussion in the appellees' brief demonstrates that the District Court erred in giving no weight to the Commission's jurisdictional findings.

The appellees concede (p. 19) that the correctness of the Commission's findings of fact in the present case was not questioned by the District Court. Surely the issue of whether there is to be an "abandonment" within Section 1(18) is as much an issue of fact as of law, on which the Commission's expert opinion, applied in a series of cases over the years, is entitled to substantial weight.

The appellees, in discussing (p. 17) *Yonkers* v. *United States*, 320 U. S. 685 (1944), ignore the fact that this Court by that decision sent the case back to the Interstate Commerce Commission in order that it make express jurisdictional findings. After such findings, the matter came back to the 3-Judge District Court which sustained those Commission findings, holding that they were entitled "to at least prima

facie weight" under this Court's decision (*Public Service Com'n of New York* v. *United States*, 56 F. Supp. 351, 353 (S. D. N. Y. 1944)). This Court thereupon affirmed the District Court's decision (323 U. S. 675 (1944)). Under these decisions, the District Court's refusal in the present case to give any weight to the Commission's jurisdictional findings was clearly erroneous.

Conclusion

In the jurisdictional statement, we believe it is demonstrated that the questions presented on this appeal are substantial and that their correct resolution is of urgent importance to the appellant and to the other railroads directly concerned, and also is of national importance because of the legal principles involved and the far-reaching effects of the decision below. In the meantime, during the pendency of this appeal, the Railroad is operating its passenger ferry lines at an out-of-pocket loss of over $100,000 a month (jurisdictional statement, p. B-39).

The motion to affirm should be denied and the Court should note probable jurisdiction.

Respectfully submitted,

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Dated: April 16, 1958.

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Nos. 41, 47 [redacted] 918

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[redacted]Y, Clerk

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1957

THE NEW YORK CENTRAL RAILROAD COMPANY,
APPELLANT

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

ERIE RAILROAD COMPANY, APPELLANT

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MEMORANDUM FOR APPELLEES UNITED STATES AND INTERSTATE COMMERCE COMMISSION IN SUPPORT OF STATEMENTS AS TO JURISDICTION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 838

THE NEW YORK CENTRAL RAILROAD COMPANY, APPELLANT

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

No. 918

ERIE RAILROAD COMPANY, APPELLANT

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MEMORANDUM FOR APPELLEES UNITED STATES AND INTERSTATE COMMERCE COMMISSION IN SUPPORT OF STATEMENTS AS TO JURISDICTION [1]

These appeals present the important question whether the Interstate Commerce Commission has

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[1] The United States and the Interstate Commerce Commission decided to appeal in these cases, but through oversight their joint notice of appeal was filed out of time. They are therefore appearing as appellees in relation to the appeals taken by the railroad companies.

jurisdiction to control the abandonment by a railroad of a passenger ferry operating entirely in interstate commerce. The District Court held that the Commission lacked power under Section 1 (18) of the Interstate Commerce Act (49 U. S. C. 1 (18)) to authorize the New York Central Railroad Company to abandon its two passenger ferry lines across the Hudson River between Weehawken, N. J., and 42nd and Cortlandt Streets in New York City, and to authorize the Erie Railroad Company to abandon its trans-Hudson passenger ferry line between Jersey City, N. J., and Chambers Street in New York City. In addition to the three trans-Hudson passenger ferry lines involved in these cases, two passenger ferry lines are operated across the Hudson River by the Lackawanna and Jersey Central Railroads, respectively. Thus, the decisions below affect the Commission's jurisdiction under Section 1 (18) with respect to five railroad passenger ferry lines across the Hudson River between New York City and New Jersey.

Section 1 (18) provides that without the prior approval of the Commission, no railroad "shall abandon all or any portion of a line of railroad, or the operation thereof."[2]

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[2] The sweep of Section 1 (18) is shown by the provision of Section 1 (22) that—

> The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Section 1 (3) provides that "The term 'railroad' as used in this part shall include all * * * ferries used by or operated in connection with any railroad." The Commission and the courts have long held that the Commission's power under Section 1 (18) does not extend to a partial discontinuance of service—as distinguished from a total abandonment or cessation of all operations of a line or portion thereof. See the cases cited in the lower court's opinion, J. St. App., No. 838, A–5 and A–6.

New York Central operates two passenger ferry lines between Weehawken, N. J., and two points in New York City, and transports freight between Weehawken and other points in New York City. Erie operates one passenger ferry line between Jersey City, New Jersey and Chambers Street in New York City and transports freight between Jersey City and other points in New York City. It is undisputed that the passenger ferry services are performed with separate vessels, on different routes, and to separate terminals on the New York side. The Commission held that these passenger ferry lines constituted lines of railroad entirely separate from the freight operations across the river. Accordingly, it concluded that it had jurisdiction under Section 1 (18) to authorize abandonment of those passenger ferry lines. In setting aside the Commission's orders, the District Court held, to the contrary, that each railroad's passenger and freight operations together constituted a single "line of railroad" within the meaning of Section 1 (18). It concluded, therefore, that cessation of the passenger

ferries involved only a partial discontinuance of service not subject to Section 1 (18).

We contend that the court below has erroneously construed Section 1 (18). The Commission long ago held that it has jurisdiction over a proposed relocation of tracks between two points, *Construction and Abandonment by G. N. Ry.*, 124 I. C. C. 685 (1927), and over the abandonment of one of two rail lines between two points. *Colorado & S. Ry. Co. Abandonment*, 180 I. C. C. 735 (1932). Similarly, this Court, in *Railroad Commission of California* v. *Southern Pacific Co.*, 264 U. S. 331, sustained the jurisdiction of the Commission under Section 1 (18) to authorize both an abandonment and extension of lines of railroad in Los Angeles incident to a relocation of tracks for the construction of a new union terminal. See also *A. T. & S. F. Ry. Co.* v. *Railroad Commission of California*, 283 U. S. 380, 390, 393. Also, in *Yonkers* v. *United States*, 320 U. S. 685, 323 U. S. 675, where this Court upheld the Commission's power to authorize New York Central to abandon a line of track used only for passenger service between New York City and Yonkers, it was not even suggested that the fact that the railroad's main line would continue to operate between those points deprived the Commission of power under Section 1 (18) to authorize abandonment of the former line.

Moreover, in prior cases, the Commission, acting under Section 1 (18), authorized the abandonment of four railroad passenger ferry lines across the Hudson River where, as here, each of the railroads involved

continued to operate other passenger or freight ferry lines between New Jersey and New York City. *Central R. Co. of N. J. Trustees Ferry Abandonment,* 249 I. C. C. 269 (1941) (Jersey City to W. 23rd Street); *Erie R. Co. Ferry Abandonment,* 252 I. C. C. 659 (1942) (Jersey City to W. 23rd Street); *Hoboken Ferry Co. Abandonment,* 267 I. C. C. 51 (1946) (Hoboken to W. 23rd Street), affirmed in unreported opinion of a three-judge court in *West 23rd Street Ferry Assoc., Inc.* v. *The Hoboken Ferry Co., et al.* (Civil Action 39–370, S. D. N. Y., April 18, 1947); *Delaware, Lackawanna & Western R. Co. Ferry Abandonment,* 290 I. C. C. 809 (1954) (Hoboken to Christopher Street), affirmed in *Board of Public Utilities Commissioners of New Jersey* v. *United States,* 132 F. Supp. 379 (D. N. J.). In the cited proceedings before the Commission and the courts, neither the New Jersey Commission nor any other protestant raised the jurisdictional question posed by the instant case.

In brief, both the prior administrative and judicial construction of Section 1 (18) suggest, contrary to the decision below, that where for geographical or other reasons a railroad operates separate and distinct passenger ferry lines across the Hudson River, each is a separate line of railroad for the purposes of the abandonment provisions of Section 1 (18).

Moreover, the decision below is inconsistent with the broad purpose of the Act and the National Transportation Policy to develop and maintain a healthy and efficient transportation system. As this Court stated in discussing the scope of Section 1 (18) in *Piedmont & Northern Ry.* v. *I. C. C.,* 286 U. S. 299,

311: "the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress."

The financial problems of the American railroads, arising in considerable part out of heavy losses on passenger service, are a matter of common knowledge. The instant cases illustrate that railroad passenger ferry operations can contribute substantially to such deficits. Thus, the Commission found that in each of the years 1952, 1953, and 1954, New York Central's net loss on the two ferry lines here involved exceeded $1,000,000. The current significance of such deficits from the ferry operations can be seen by comparing it with New York Central's total net income in 1957 of $8,423,078. Erie's passenger ferry losses bear a similar significant relationship to that carrier's total net income.

Moreover, it appears that the court below assumed that if the Interstate Commerce Commission may not control the abandonment of railroad ferry lines across the Hudson River, the States of New York and New Jersey can do so. But this assumption is highly doubtful in view of *New York Central Railroad* v. *Hudson County*, 227 U. S. 248. There this Court, in holding invalid a local New Jersey ordinance purporting to regulate passenger fares on New York Central's trans-Hudson ferries, stated (p. 264):

> * * * But as all the business of the ferries between the two States was interstate commerce

> within the power of Congress to control and subject in any event to regulation by the State as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the State. We think the argument by which it is sought to limit the operation of the act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from State to State is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested. [Cf. *Chicago, B. & Q. R. Co.* v. *Illinois Commerce Commission,* 82 F. Supp. 368, 376 (N. D. Ill.).]

The decisions below thus could well result in permitting the railroads to discontinue at will their passenger ferry lines between New York and New Jersey. While the question of the states' power is not now before the Court, it is pertinent that the decision below, if unreversed, can create such a gap in regulation. Since it is incredible that Congress intended to exempt from all public control the discontinuance of what was a vital link in rail transportation in 1920 (when Section 1 (18) was enacted), such a conclusion should not be reached unless there is no escape from it. *Cleveland, C. C. & St. L. Ry. Co.* v. *United States,* 275 U. S. 404, 412.

The question presented by these appeals is of considerable importance in the administration of the Interstate Commerce Act, and should be decided by this Court. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 41

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BERGEN COUNTY, NEW JERSEY, ROCKLAND COUNTY, NEW YORK, the NEW JERSEY MUNICIPALITIES OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD, RIDGEFIELD PARK, TEANECK and WEEHAWKEN, the CITIZENS UNITED TRANSIT COMMITTEE, an unincorporated association, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and ROBERT J. KILPATRICK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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IN THE

Supreme Court of the United States

OCTOBER TERM—1957

No. 838

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BERGEN COUNTY, NEW JERSEY, ROCKLAND COUNTY, NEW YORK, THE NEW JERSEY MUNICIPALITIES OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD, RIDGEFIELD PARK, TEANECK and WEEHAWKEN, THE CITIZENS UNITED TRANSIT COMMITTEE, an unincorporated association, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and ROBERT J. KILPATRICK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Motion to Affirm

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the appellees noted in the margin*

* Board of Public Utility Commissioners of the State of New Jersey, The State of New Jersey, Bergen County, New Jersey, Rockland County, New York, The New Jersey Municipalities of Bergenfield, Bogota, Dumont, Harrington Park, Haworth, Norwood, Ridgefield Park, Teaneck and Weehawken, and the Citizens United Transit Committee, an unincorporated association.

move that the judgment of the District Court be affirmed on the ground that the questions raised by the appellant are so unsubstantial as not to warrant further argument.

Statement of the Case

This is a direct appeal from a judgment of a statutory three-judge District Court entered December 31, 1957, pursuant to 28 U.S.C. 1253, which set aside, annulled and permanently enjoined the enforcement of an order and certificate issued by the Interstate Commerce Commission, in Finance Docket No. 18781, dated May 15, 1957. The order and certificate purported to authorize the abandonment of the passenger ferries operated by the appellant across the Hudson River between Weehawken, N. J., and New York City, N. Y., without the simultaneous abandonment of the freight ferries operated by the appellant between the same cities. The Commission had ruled that the passenger ferries are "individual extensions of lines of railroad," separate and distinct from the appellant's freight ferries, and that the Commission therefore had jurisdiction, under Section 1(18) of the Interstate Commerce Act, to entertain the appellant's application for the said certificate.

The Board of Public Utility Commissioners of the State of New Jersey, and the State of New Jersey, filed in the District Court of the United States for the District of New Jersey a petition for review of the order of the Interstate Commerce Commission. The other appellees intervened as plaintiffs, and the appellant intervened as defendant.

The District Court, having heard and duly considered the pleadings, the evidence and the briefs and arguments of counsel, and having taken the cause under advisement, rejected the thesis of the Commission that the said ferries are "individual extensions of lines of railroad" and held that the appellant's passenger and freight ferries between

Weehawken and New York City are collectively the final portion of the appellant's line of railroad between Albany, New York and New York City by way of Weehawken. Applying pertinent decisions of this Court, and of the Commission itself, with respect to partial discontinuance of operations over a line of railroad or a portion thereof, the District Court reached the conclusion that the certificate granted to the appellant for abandonment of its passenger ferries without simultaneous abandonment of its freight ferries was in excess of the statutory powers of the Commission and must be set aside.

The Court expressed serious doubts as to the adequacy of the Commission's findings of fact on the question of public convenience and necessity and of the support of those findings by substantial evidence, but, because of its definitive conclusion that the Commission was without jurisdiction to entertain and grant the appellant's application, the Court did not pass upon that point.

ARGUMENT

The decision of the District Court presents no question of substance warranting further argument in this Court.

It is well settled by decisions of this Court and of the Interstate Commerce Commission that the power of the Commission, under Section 1(18) of the Interstate Commerce Act, to authorize the abandonment of a portion of a line of railroad does not include the power to authorize partial discontinuance of service over a portion of a line of railroad.

The correctness of the District Court's conclusion that the rule established by these decisions is applicable to the appellant's passenger and freight ferries, as the final portion of the appellant's line of railroad between Albany,

New York, and New York City by way of Weehawken, New Jersey, is clearly demonstrated in the Court's opinion. This division of the appellant railroad is a line of railroad between Albany, New York and New York City; the passenger and freight ferries between Weehawken, New Jersey and New York City constitute a portion of that line of railroad.

The application of the above-mentioned decisions to the passenger and freight ferries operated by the appellant across the Hudson River raises no question of national importance.

The District Court's decision was made with obvious care and with full appreciation of the standards of review laid down by this Court.

I. Abandonment versus Partial Discontinuance of Service

As stated by the District Court (App. A-2), "the sole source of authority claimed by the Commission and urged by the carrier" for the issuance of the order and certificate against which the appellees sought relief "is Section 1, Paragraph 18, of the Interstate Commerce Act, inserted by 41 Stat. 477," the Transportation Act of 1920. The said paragraph, as incorporated in 49 U.S.C. §1(18), reads as follows:

> "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience

> and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, *and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.* * * *" (Emphasis supplied).

The cases in which this Court has held that elimination of part of the service of a portion of a line of railroad is not abandonment of a portion of a line of railroad within the meaning of the said paragraph, include the following, which were cited by the District Court (App. A-4, A-6); *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939); and *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U. S. 341 (1951). The *Palmer* decision was cited by a three-judge District Court in *Banta* v. *United States*, 152 F. Supp. 59, 60 (D. N. J. 1957), in connection with the statement that "it was agreed between the parties that the Interstate Commerce Commission has no authority to allow a railroad to discontinue an individual interstate train." The judgment of the District Court, rejecting "the novel contention" that the Commission has such authority under a section of the Act other than Section 1, was affirmed by this Court in a *per curiam* opinion, Case No. 506, November 12, 1957, 355 U. S. 33, 34.

The first of the twelve decisions of the Interstate Commerce Commission to the same effect cited by the District Court in the instant case (App. A-5, A-6) was issued in 1925 and may be regarded as involving "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S.

294, 315. The last of these decisions so cited was issued in 1954. The twelve decisions reflect a well-considered and long-established administrative interpretation of Section 1(18) of the Act.

Regarding *Morris and Essex Railroad Co. Abandonment*, 175 I.C.C. 49, 52 (1931), one of the most striking of the decisions just mentioned, the District Court said (App. A-5): "* * * the application asked for total abandonment, both freight and passenger, of a portion of a railroad line and of just the passenger service of the balance * * * The Commission recognized its jurisdiction over the first part of the application but, holding [that] it had no authority over the second and that the latter was an essential constituent of the application, denied the entire request".

The four cases in which the Commission issued certificates, between the years 1941 and 1954, purporting to authorize abandonment of trans-Hudson passenger ferries operated by railroad companies which continue to operate trans-Hudson freight ferries, do not reflect a well-considered or long-established administrative interpretation of Sections 1(18-20) of the Act.

(a) The jurisdiction of the Commission was not challenged in any of those four cases.

(1) In *Central Railroad Company of New Jersey Trustees Ferry Abandonment*, 249 I.C.C. 269 (1941), the applicant sought authorization "to abandon a portion of its line of railroad consisting of a ferry between Jersey City, Hudson County, N. J., and West Twenty-third Street, New York, New York County, N. Y." No objection to the application was offered. The Commission, in its report, made no express finding of jurisdiction under Section 1(18) of the Interstate Commerce Act. It noted that the operation of the railroad's remaining passenger ferry (the

Liberty Street ferry) on a 24-hour basis would relieve to a large extent whatever inconvenience might be suffered by patrons of the line to Twenty-third Street.

(2) In *Erie Railroad Company Ferry Abandonment*, 252 I.C.C. 659 (1942), the applicant sought authorization "to abandon the Erie System ferry between Jersey City and West Twenty-third Street, New York City". The Commission's report contains the statement that the applicant's ferry service to New York City is performed by a pool of seven vessels and that operation of the applicant's Chambers Street ferry is to be continued with an additional boat to be operated throughout the day. It contains no express finding of jurisdiction under Section 1(18) of the Interstate Commerce Act.

(3) The third case, *Hoboken Ferry Company et al. Abandonment*, 257 I.C.C. 51 (1946), relates to one of the three passengers ferries that were operated by the Delaware, Lackawanna and Western Railroad Company, until 1946, between that company's Hoboken terminal and New York City: to Twenty-third Street, Christopher Street and Barclay Street, respectively. The ferry involved in this case ran to West Twenty-third Street. The Commission stated in its report that the Lackawanna was using, on its three "ferry lines or routes", a pool of 13 vessels (24 hours a day to and from Twenty-third Street, 5 A.M. to 9 P.M. except Sundays to and from Christopher Street, and 5:30 A.M. to 12:30 A.M. daily to and from Barclay Street) and that, if abandonment of the Twenty-third Street ferry was permitted, the Lackawanna proposed to operate the Christopher Street ferry 24 hours a day and place an additional boat in service on that route. The report does contain an express finding that the Twenty-third Street ferry was a line of railroad within the meaning of Section 1(18) of the Act and that "the proposed abandonment" was subject to the jurisdiction of the Commission under the said section.

This finding was made in view of the suggestion of the *applicants* that the discontinuance of the Twenty-third Street ferry might be regarded as a transfer of service to Christopher Street rather than as an abandonment of the Twenty-third Street ferry. The Commission held, quoting syllabus No. 1 of *Atchison, T. & S. F. Ry. Co.* v. *Railroad Comm. of California*, 283 U. S. 380 (1931) that its approval must be obtained, under the head of "rearrangement, extension and abandonment of tracks, and the use of the terminal facilities", even if "the proposed abandonment" were considered as merely "a relocation of terminal facilities in New York City".

(4) *Delaware, Lackawanna & W. R. R. Ferry Abandonment*, 290 I.C.C. 809 (1954), affirmed in *Board of Public Utilities Commissioners* v. *United States*, 132 F. Supp. 379 (1955), involved the above-mentioned Christopher Street ferry. The report of the Commission in this case was not printed. It appears from the decision of the three-judge District Court which affirmed the order of the Commission authorizing abandonment of the Christopher Street ferry that the applicant undertook to continue to operate the Barclay Street ferry around the clock. The District Court in the instant case, including one of the judges who sat in the *Lackawanna* case, states that the Commission's jurisdiction was not challenged in the latter case, was never before the Court and was not passed upon by the Court in that case (App. A-4).

(b) The first of these cases was decided twenty-one years after the adoption of the provision of the Act by which the Commission was given jurisdiction in matters of abandonment. The element of contemporaneousness of interpretation was therefore absent.

(c) Upon consideration of these four cases together it appears that the Commission exercised jurisdiction somewhat absent-mindedly in the first two cases; that its ex-

press finding of jurisdiction in the third case was based largely upon the consideration of instances in which, as stated in its report of September 27, 1956, in the instant case (App. B-10), "the discontinuance of a particular service over a line of railroad would result in the trackage involved no longer being required for use in interstate commerce"; without any examination of whether "trackage", toward which the carrier has a maintenance responsibility, is fairly equivalent to a waterway toward which the carrier has no maintenance responsibility, and that it did not in any of these four cases consider the significance of the fact that an extension of the line of railroad of a railroad which holds itself out as a common carrier of persons and goods must include equipment for the carriage of both persons and goods. The last-mentioned fact does not appear to have been brought sharply into focus in any of these four cases. It may well be that State authorities and interested individuals and communities did not have the necessary incentive to point out the implications of this fact so long as each successive discontinuance of service by one passenger ferry was accompanied by an undertaking of the railroad to increase service by one or more remaining passenger ferries. It is only when a railroad proposes to discontinue its passenger ferry service altogether that those who depend upon such service are aroused to the point of challenging the statutory power of the administrative body which purports to authorize the discontinuance of such service.

II. Appellant's Passenger and Freight Ferries a Single, Integral Portion of a Line of Railroad

The routes traversed by units of the appellant's floating equipment in the transportation of persons and goods across the Hudson River constitute a single, integral portion of the appellant's line of railroad as extended from its former terminus at the exit from the Weehawken tunnel (App. B-4).

The District Court found as facts, on the basis of the record, that the appellant or its predecessors have furnished railroad passenger and freight service between Albany and New York City by way of Weehawken since 1883; that the single franchise under which the appellant's predecessor operated across the Hudson River called for a unified passenger and freight service; that the allocation of the passenger service to ferry boats and of the freight service to lighters and barges which follow different routes across the river and are accommodated at different docks on the New York side is due to considerations of convenience and to the directions of municipal authorities; and that the appellant intends to maintain its freight service under the above-mentioned franchise while discontinuing its passenger ferries (App. A-2, A-6, A-9).

The District Court held on the law that the final portion of the appellant's line of railroad between Albany and New York City by way of Weehawken is a passenger and freight service across New York Harbor from Weehawken to Manhattan; that the appellant's passenger and freight ferries are no more and no less than the continuance of the West Shore line to New York City; and that the distinctions noted in the Commissioner's opinion between the appellant's passenger and freight services of the one railroad line do not support the Commission's thesis that these services are separate and independent lines (App. A-2, A-9, A-10).

The Commission has jurisdiction over the abandonment only of a line or a portion of a line of railroad. Any contention that the ferry service in question is by definition a line of railroad or a portion of a line of railroad is without substance. It is, moreover, inaccurate and misleading. It is true that, according to Section 1 (3) of the Interstate Commerce Act, the term "railroad" includes ferries used or operated in connection with any railroad. The same

term, however, according to the same section, includes bridges, car floats, lighters, terminals and terminal facilities. It is obvious that neither a car float nor a lighter *is* a line or a portion of a line of railroad, any more than a terminal or a terminal facility *is* a railroad, because each of these instrumentalities or appurtenances is included in the term "railroad" for the purposes of regulation by the Interstate Commerce Commission. It should be equally obvious that a ferry, in the popular sense of a boat is not necessarily a line or a portion of a line of railroad and that, as the District Court pointed out, the distinction between the ferry boats used by the appellant in transporting passengers and the lighters and barges used by it in moving freight is no more significant in this relation than would be the distinction between freight and passenger cars.

A ferry or a bridge used or operated in connection with a railroad cannot be of itself an entire line of railroad. Such a ferry or bridge may be a portion of a line of railroad when it is the connecting link in a line of railroad for the transportation of both persons and goods. *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382 (1932). A ferry so used differs from a bridge so used only in the fact that it may consist of a number of divergent or undefined routes across the water. A ferry so used consists of all the routes traversed by its various units of floating equipment where they terminate in essentially the same locality without affording any intermediate service.

In holding that the human, and vehicular freight ferries operated by the appellant across the Hudson River are no more and no less than the continuance of its line of railroad from Weehawken to New York City, the District Court found support in this Court's decision in the *Claiborne* case. It was noted by this Court that the ferry proposed for the transportation of both passengers and freight,

would be "operated as a part of the Railway's line." 285 U. S. at 392. As pointed out by the District Court (App. A-7), "the Claiborne ferry could handle its freight on the same vessel as the passengers" because "it dealt with a minor traffic condition." Subsequent discontinuance of Claiborne's passenger service would, however, in the Court's opinion, be easily recognized as beyond the jurisdiction of the Commission, since it would obviously have been "only a portion of the service of the ferry extension which was being cancelled."

Appellants rely in their brief upon three other district court decisions which are plainly distinguishable (Appellant's brief, pp. 16, 17). In *Public Service Commission* v. *United States*, 56 F. Supp. 351 (S. D. N. Y. 1944) the termini other than the common terminus of the diverging service were about thirty air line miles apart in different municipalities in different counties. In both *Georgia* v. *United States*, 28 F. Supp. 749 (E. D. Va. 1939) and *In re Long Island R. R.*, 92 F. Supp. 85 (E. D. N. Y. 1950), cases where operation over part of one of two parallel routes of service was discontinued, there were intermediate points, service to which was terminated. The affording of service at intermediate points identifies parallel routes as distinct lines. In all three cases, loss of trackage was involved. In the present case of course no trackage is involved, nor is there service at intermediate points on the routes across the river.

The decision of this Court in *New York Central R. R.* v. *Hudson County*, 227 U. S. 248 (1913), cited by the appellant in indicating its apprehension that State authorities may seek to regulate its trans-Hudson ferries, has no pertinence to the issue involved in the instant case. The case cited was decided seven years before the Commission was vested with jurisdiction to authorize the abandonment of lines of railroad or portions thereof. This Court had no

occasion, in 1913, to consider whether the passenger ferries and freight ferries operated by the appellant as railroad ferries constitute separate extensions or a single extension of the appellant's line of railroad from its former terminus at the mouth of the Weehawken tunnel. The passenger ferries referred to by this Court as railroad ferries, at 227 U. S. 257, are doubtless subject to regulation by the Interstate Commerce Commission to the extent that Congress has vested the regulatory power over rates in the Commission. This case is no authority for a broader assumption of regulatory power by the Interstate Commerce Commission.

III. Relative Importance of the Instant Case

The appellant argues that the issue of jurisdiction decided by the District Court in the instant case is of national importance. It submits that this issue involves conflicting claims of the United States and the States of New Jersey and New York with respect to the regulation of interstate commerce and that on the final decision of this issue may hang the solvency of the appellant and of other companies which operate ferries as connecting links in their lines of railroad.

The question whether the Interstate Commerce Commission has jurisdiction to authorize the discontinuance of passenger ferries operated over an extension of a line of railroad without simultaneous discontinuance of freight ferries operated over the same extension involves conflicting claims of federal and state governments only in a forensic sense. The decision of this case depends upon the determination of the intent of Congress in the adoption of a statutory provision which has been interpreted by an administrative agency of the United States in a way to which the parties, including a state government, which has standing to do so under paragraph (20), section 1 of the

act, *Colorado* v. *United States*, 271 U. S. 153 (1926), object in a court of the United States. The executive and judicial departments of the Government of the United States have certainly no interest in having this statutory provision interpreted and applied in a manner at variance with the intent of the legislative department, which has sole responsibility under the Constitution for fixing the limits of the power that it has delegated to the Interstate Commerce Commission.

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark* v. *Wickard*, 321 U. S. 288, 309 (1944)

The District Court has discharged its responsibility by deciding the issue of jurisdiction in accordance with the law as it stands. As the Court states (App. A-11), Congress may decide to grant the Commission jurisdiction which it has not yet granted, but "until that time, the Commission, strictly a creature of its creating statute," is, in the Court's opinion, without the power to permit the discontinuance of the partial service rendered by the appellant by passenger ferries across the Hudson River.

The financial solvency of the appellant and of other railroads is, of course, a matter of concern to this Court in any case in which it is shown to this Court that the intent of the Congress to provide procedures for the reduction of burdens on interstate commerce may have been thwarted by the decision of a three-judge District Court. It is submitted that it is clear from a reading of the decision of the District Court in this case that the statutory provision in question has been correctly interpreted and applied by that Court.

In the present case there has been no determination of the profit position of the appellant's combined trans-Hudson passenger and freight operation. The examiner and the commission would not allow evidence of the freight on combined trans-Hudson operations as irrelevant under his and its view of the question whether the passenger ferry service constituted a line of railroad in itself (App. Br. 16). Many statements in the appellant's brief (*e.g.*, Appellant's Brief p. 11) suggest a financial portion verging on bankruptcy without support in the record. It has been held that the profitability of the entire operation of a branch line is to be considered on applications for abandonment or curtailment of service. That the segregated passenger traffic account here shows a deficit would only become significant after a determination that the passenger operation across the river was a line in and of itself. Any reliance by the appellant on the passenger deficit in showing the importance of the case is immaterial in view of the decisive issue as to whether the Weehawken to Manhattan passenger service is a *line* of railroad, the only possible subject of the jurisdiction contended for.

IV. The District Court's Compliance With Proper Standards of Review

The District Court accorded due respect to the Commission's holding that the Commission had jurisdiction in the instant case on the basis of the Commission's conclusion that the appellant's passenger ferry routes are individual portions of lines of railroads.

Appellant urges that the Commission's conclusion should "be accepted if reasonable, even * * * where the Court itself might have reached a different result," citing *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111, 130-1 (1944). In answer to "a suggestion that the administrative decision construing a statutory term should be treated as conclusive" under the *Hearst* case, this Court has said:

> "The Social Security Board and the Treasury were compelled to decide, administratively, whether or not to treat 'back pay' as wages; and their expert judgment is entitled, as we have said, to great weight. The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact. Both [the *Hearst* case and another] advert to the limitations of administrative interpretations. * * * An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Bd.* v. *Nierotko*, 327 U. S. 358, 368, 369 (1946) (in which this Court construed the term in question contrary to the construction of both the administrative agency and the district court).

This Court has applied the rule of the *Nierotko* case to a construction of a statutory term by the Interstate Commerce Commission. *East Texas Lines, Inc.* v. *Frozen Food Exp.*, 351 U. S. 49, 54 (1956). The court, although holding that the determination by the commission that dressed poultry was a "manufactured" commodity was entitled to "great deference because of [the commission's] familiarity with the conditions in the industry which it regulates," upheld the contrary view of the district court since "[a] chicken that has been killed and dressed is still a chicken. Removal of its feathers and entrails has made it ready for market. But we cannot conclude that this processing which merely makes the chicken marketable turns it into a 'manufactured' commodity." Parodying this language, in effect the district court in the present case has said:

> "An integral line of railroad that crosses a river by convenient means remains an integral line of railroad. Separation of the passengers, express and less than carload lot freight (B-12) onto ferries and the freight onto lighters and car floats at the water's edge

> makes the transportation service attractive to the patron. But we cannot conclude that this process which merely makes the service marketable turns a part of the service on the integral line of railroad into a distinct line."

The *East Texas Lines* case's limited deference to the Interstate Commerce Commission's construction of a statutory term is a reaffirmation of a rule antedating the *Hearst* case. In *United States* v. *Idaho*, 298 U. S. 105 (1936) the question was whether abandonment of a certain nine mile length of track was excluded from the ICC's jurisdiction as a "spur" under paragraph 22 of Section 1 of the Interstate Commerce Act. The commission ruled that it was not. The district court took the opposite view. "The appellants object[ed] that since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive * * *." 298 U. S. at 109. But this Court answered: "[W]hether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission." *Ibid.* This court repeated the characterization of the question of construction of statutory limits of ICC jurisdiction as one of mixed law and fact not for conclusive determination by the commission in *Yonkers* v. *United States*, 320 U. S. 685, 689 (1944). The particular issue there was whether a certain line or portion of a line was an "interurban electric railway * * * not * * * part of the steam railroad system" within the exemption of paragraph 22 of Section 1 of the Act.

Earlier it had been held by this Court that one carrier could sue to enjoin as an uncertificated "extension" of a line of railroad what another carrier considered merely an exempt "industrial" track under paragraph 22. The evaluation of the facts was for the district court. There was no

provision in law for a construction by the commission in such cases. *Texas & Pac. Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266, 271 (1926). In a suit between private parties for overtime pay under the Fair Labor Standards Act this Court likewise held that the interpretations of the statutory term by the Administrator afforded "guidance" to the court, but the final determination was for itself. *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944). One of the significant factors for evaluating the "weight" attaching to an interpretation by the Administrator was "its consistency with earlier and later pronouncements * * *." 323 U. S. at 140. In the present case, one of the principal reasons for the district court's reversal of the commission's action was because the court found it inconsistent with at least twelve prior decisions by the same commission (App. A-4 to 6).

The thoroughgoing examination by the district court of the commission's jurisdictional finding in the present case (App. A-8, 9) gave it all the weight to which it was entitled, and certainly shows as untrue the appellant's statement that the district court "refused to pay any attention to the ICC holding" (Appellant's brief, p. 13). The principal fact which the commission relied on was that the precise points of termination in New York City of the carriage of freight and the carriage of passengers did not coalesce (App. B-7). "The thought that the passenger and freight traffic do not have the same docks on the New York side" was found insignificant by the district court because "[t]hat municipality controls its waterfront and its water transportation ties up as the city directs" (A-9).

The appellant accuses the district court of "grasping at straws when it sought to support its conclusion by the statement that the passenger ferries are repaired by the same facilities and employees of the Railroad as are used to repair its car floats and lighters" (Appellant's brief, p. 17). What the district court was really doing was giving

due deference to the finding by the commission that "the ferry terminals, docks, vessels, and other facilities and services of the New York Central are maintained physically apart from the car-float and lighter equipment and other facilities used in transporting freight across the river" (B-7). The district court shows that "maintained" here cannot mean "repaired", because the same shops and employees do the repairing of both, as the commission seems to acknowledge when it says "the charges for each are clearly separable according to regular accounting methods * * *" (App. B-7, B-15). The district court then shows that the alternate possible meaning, *i.e.*, that the transportation facilities are physically distinguishable, is no more significant in determining whether a curtailment of service is an abandonment of a line of railroad than that freight and passenger cars are distinct facilities.

The findings of fact of the Commission were fully considered by the District Court and their correctness was not questioned by the Court. It was only the Commission's conclusions of law on the basis of those findings that the District Court rejected. After quoting the findings of fact, the District Court stated in its opinion (App. A-9):

> "The distinctions outlined are without a difference. They fail utterly to indicate any substantial disassociation of the ferry from its rail member. On the whole record they do not support the Commission's thesis that the passenger and freight services of the one railroad line have suddenly become separate and independent lines because they are water-borne across the harbor to the end of the same one original line."

We submit that the Commission's conclusions of law had no reasonable basis in law and that they were rejected by the District Court only after full and respectful consideration.

CONCLUSION

For the foregoing reasons, we submit that the decision of the District Court is correct and this appeal presents no substantial question. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

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AND

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 41

THE NEW YORK CENTRAL RAILROAD COMPANY,
Appellant,

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of New Jersey

For the Board of Public Utility Commissioners of the State of New Jersey and the State of New Jersey

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 838

THE NEW YORK CENTRAL RAILROAD COMPANY,
Appellant,

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of New Jersey

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MOTION TO STRIKE

Pursuant to Rule 35 of the Revised Rules of this Court, the Appellees noted in the margin* move that

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* Board of Public Utility Commissioners of the State of New Jersey, The State of New Jersey, Bergen County, New Jersey, Rockland County, New York, The New Jersey Municipalities of Bergenfield, Bogota, Dumont, Harrington Park, Haworth, Norwood, Ridgefield Park, Teaneck and Weehawken, and the Citizens United Transit Committee, an unincorporated association.

the memorandum entitled "Memorandum for Appellees United States and Interstate Commerce Commission in Support of Statements as to Jurisdiction", submitted by the United States and the Interstate Commerce Commission for consideration by the Court in the above-entitled case and in Erie Railroad Company, Appellant, v. Board of Public Utility Commissioners of the State of New Jersey, et al., Appellees, No. 918, be stricken from the record in this case.

The reasons for this Motion are the following:

1. The United States and the Interstate Commerce Commission failed to make timely application for review of the judgment of the Court below.

2. The Rules of this Court make no provision for the filing as appellees of memoranda in support of the statements of appellants.

3. Acceptance of the above-mentioned memorandum for consideration by the Court would be inconsistent with the settled practice of the Court in that:

a. The said memorandum submitted as for appellees presents arguments against the correctness of the judgment of the District Court under consideration.

b. This Court said in Federal Trade Commission v. Pacific States Trade Association, 273 U. S. 52, 66: "A party who has not sought review by appeal or writ of error will not be heard to question the decree of the lower court. This is so well settled that citation is not necessary."

4. No action has been taken by this Court to consolidate the separate appeal in Erie Railroad Company,

Appellant v. Board of Public Utility Commissioners of the State of New Jersey, et al., Appellees, No. 918.

Respectfully submitted,

For the Board of Public Utility Commissioners of the State of New Jersey and the State of New Jersey

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CERTIFICATE OF SERVICE

I, William A. Roberts, a member of the bar of this Court and one of counsel for Board of Public Utility Commissioners of the State of New Jersey, The State of New Jersey, Bergen County, New Jersey, Rockland County, New York, The New Jersey Municipalities of Bergenfield, Bogota, Dumont, Harrington Park, Haworth, Norwood, Ridgefield Park, Teaneck and Weehawken, and the Citizens United Transit Committee, an unincorporated association, appellees in the above-entitled case, hereby certify that, on the 14th day of May I served the said Appellees' Motion to Strike on the appellant by mailing copies, in duly addressed envelopes, with first class postage prepaid, to its counsel of record, Thomas E. Dewey, Esq., 40 Wall Street, New York 5, N. Y., and Gerald E. Dwyer, Esq., 466 Lexington Avenue, New York 17, N. Y., and that, on the same day, I served the said Motion on the United States and the Interstate Commerce Commission, respectively, by mailing copies in duly addressed envelopes, with first class postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., and the Interstate Commerce Commission, for the attention of Robert Ginnane, Esquire, Chief Counsel, Washington 25, D. C.

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